TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 123.

THE SAND FILTRATION CORPORATION OF AMERICA, APPELLANT,

vs.

SAMUEL P. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY, AND THOMAS E. STAGG, AND ROBERT H. MAY, GEORGE E. JEKYLL, AND ARTHUR D. JEKYLL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JULY 8, 1907.

(20,782.)

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1 In the Court of Appeals of the District of Columbia.

No. 1746.

THE SAND FILTRATION CORPORATION OF AMERICA, Appellant,
vs.
SAMUEL P. COWARDIN ET AL.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia ss:*

No. 24167. Equity.

THOMAS E. STAGG, Complainant,
vs.
SAMUEL P. COWARDIN, JAMES F. BRADLEY, and SYDNEY P. CLAY, Defendants.

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:

Petition for Rule on Receiver.

Filed March 13, 1906.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

No. 24167. Equity.

THOMAS E. STAGG, Complainant,
vs.
SAMUEL P. COWARDIN, JAMES F. BRADLEY, and SYDNEY P. CLAY, Defendants.

The petition of Samuel P. Cowardin, James F. Bradley, Sydney P. Clay and Thomas E. Stagg, parties to the above cause, show to the court as follows:

First. Your petitioners compose the firm of Cowardin, Bradley, Clay and Company, who obtained the contract from the United States Government for the construction of the filtration plant
2 as shown in the record of this cause and dated the 6th day of April, 1903.

Second. At the date of the filing of the original bill in this cause, Robert H. May, George E. Jekyll and Arthur B. Jekyll, trading

under the firm name of May and Jekyll, who had made a contract with your petitioners to do the work covered by their said contract with the United States Government, had announced their wish to be relieved from their said contract, and a contract between your petitioners and Henry B. Dean, trading as Dean and Shibley, was in negotiation to take up the said work where the said firm of May and Jekyll desired to discontinue it; and, as will appear by the record in this case, John D. Maclennan was appointed receiver herein for your petitioners' said firm, and as such receiver was authorized to and did conclude a contract with the said Dean, representing himself and a proposed future corporation to be known as the Sand Filtration Corporation of America, which said contract was thereafter, by the authority of this court, duly executed by the said receiver and the said Dean, and the said corporation was thereafter duly formed and was substituted for the said Dean in said contract, all of which will more fully appear by reference to the contract between said Maclennan, receiver, and the said Dean, dated the 25th day of August, 1903, with which contract is also filed of record in this cause an agreement between petitioners and the said firm of May and Jekyll, under date of August 25th, 1903, both of which contracts and agreements are prayed to be read as a part of this petition.

Third. Shortly prior to the institution of this suit, on to wit, August 25th, 1903, the said May and Jekyll, had entered into an agreement with petitioners for the cancellation of their original contract, dated May 26th, 1903, and subsequent to the execution of the said contract of August 25th, but on the same day, the petitioners entered into a contract with Dean and Shibley, in effect employing them to complete the work remaining unperformed by the said firm of May and Jekyll, both of which contracts are filed with the report of the said receiver Maclennan, in this cause, bearing date the — day of —— and prayed to be read as a part hereof. Under the contract of August 25th, 1903, with May and Jekyll, in the fifth paragraph thereof, as will be seen by reference thereto, the petitioners agreed to pay to May and Jekyll the sum of $8,000.00 out of any net profits which petitioners might realize from the construction or erection of that portion of the filtration plant which they had contracted to construct or erect with the United Sates Government under their said contract of April 6th, 1903; and in the said contract bearing the same date, but executed subsequently, between the petitioners and the said Dean, the latter for himslf and the said Sand Filtration Corporation when organized, assumed payment of the said $8,000.00, and also contracted to pay to the petitioners the sum of $65,000.00 to be paid out of the instalments on account of said construction which were to be paid by the United States Government under the said original contract, as is more fully set out in the said fourth paragraph of the contract between
3 the petitioners and Dean, trading as Dean and Shibley, as above set forth. Thereafter, the receiver in this cause, by authority of this court therein, entered into a contract with the said Dean acting for himself and the said future proposed corporation,

bearing date the 27th day of August, 1903, a copy of which is also contained in the record in this cause, and prayed to be read as a part hereof, in the fourth paragraph of which last-named contract the said Dean was required to deduct from the amounts paid by the United States Government, as the work progressed under him and his said future corporation, the amounts which he and it were to pay to or for the benefit of Cowardin, Bradley, Clay and Company as provided by the said contract of August 25th, 1903, namely the said sum of $65,000.00 for the benefit of the said Cowardin, Bradley, Clay and Company; and the said sum of $8,000.00 which they were under obligation to pay to May and Jekyll under their contract of the same date with the said last-named firm, if they realize a profit out of their said contract with the United States Government, and by a supplemental contract between the respondents and the said Dean, dated August 27th, 1903, a copy of which is attached hereto and prayed to be read as a part hereof, the said receiver was authorized to deduct from the money paid to him by the Government as the said work progressed, and in the instalments specified in the contract between respondents and Dean of August 25th, 1903, as aforesaid, the said sum of $65,000.00 and $8,000.00 and to pay the same directly to your petitioners instead of first paying them to the said Dean, acting on behalf of himself and his said future corporation, and then receiving them back from said Dean or said future corporation, as had been apparently provided by the said contract of August 25th, 1903.

Fourth. Your petitioners show to the court that the work covered by their contract with the United States Government was accepted by said Government as finished and completed on or about the — day of January, 1906, and full payment therefor was made by the United States Government to the said receiver on or about the — day of January, 1906. Out of the instalments paid by the Government prior to the final payment, the said receiver has paid to your petitioners $45,000.00 on account of said $65,000.00 which was so to be paid to them, and, out of the said final payment, he has paid them the sum of $10,000.00, but still holds in his hands the remaining $10,000.00, of the said $65,000.00, and also the said $8,000.00 which was to be paid to May and Jekyll in the event of petitioners realizing a profit under said contract as set forth in their said contract with May and Jekyll, of August 25th, 1903, which said amounts of $10,000.00 and $8,000.00 the receiver has failed and refused to pay to your petitioners, though thereunto frequently requested.

Fifth. The petitioners are informed and believe, and therefore aver, that the said refusal of the receiver to pay the two amounts of $10,000.00 and $8,000.00 above referred to is because the Sand Filtration Corporation has objected to the said payments on the following grounds:

4 (*a*) The Sand Filtration Corporation not having completed the work covered by its contract within the contract time, applied to the United States Government for an extension of said time, which extension the said Government declined to grant

except upon terms that the Fidelity and Guaranty Company of Baltimore, which was the surety upon the petitioners' original contract for said work, would consent, which consent said Surety Company declined to give except upon terms of the payment of a further premium of $500.00, which further premium or bonus the Sand Filtration corporation paid to the said Surety Company in order to obtain the said extension. The said Sand Filtration Corporation now claims, as the petitioners are informed and believe, and therefore, that this $500.00 should be deducted from the said $10,000.00 remaining to be paid to your petitioners out of the $65,000.00, notwithstanding the fact that the necessity for the said payment arose through failure of the Sand Filtration Corporation to carry out its contract with the receiver within the time limit fixed by the said contract and the fact that the said payment to said Surety Company, if proper to be made at all, which your petitioners have all along denied, was occasioned by such default on the part of the said Sand Filtration Corporation.

(*b*) The objection by the Filtration Corporation to the payment of the said $8,000.00, upon which objection the receiver is refusing to pay the same, as your petitioners are informed and believe and therefore aver, is based upon two grounds, namely: (1) That, in the transfer of its assets by the said May & Jekyll Company to your petitioners, and in the contemporaneous transfer by them to the said Dean of the said assets, there was a duplication in the schedule of mules, constituting part of the said assets, amounting to $1,190.00, the said assets being less in value to that extent than was represented by the said May and Jekyll at the time of the said transfer, as is claimed by the said Sand Filtration Corporation, which Corporation thereupon claims that the said duplicated amount of assets should be deducted from the said $10,000.00; and, (2) The said Sand Filtration Company Corporation further claims that the $8,000.00 was not to be paid under the terms of the contract of August 25th, 1903, between the said firm of May and Jekyll and these petitioners and the contemporaneous contract of the same date between these petitioners and the said Dean, unless the petitioners realized a profit from their sand contract with the United States Government, and, as is contended by the said Sand Filtration Corporation, unless the said Dean or the said Company, also, realize a profit from the said contract, which latter contingency it claims has not occurred, the said work having been completed by it at a loss, as it alleges and as these petitioners believe to be true. On the other hand, the $55,000.00 thus far paid by the receiver to these petitioners, and the remaining $10,000.00 yet to be paid them under the said agreement or contract, entirely, if not altogether, was a profit realized by these petitioners out of their said contract with the United States Government, and said May and Jekyll claim that, under their contract with these petitioners, they are entitled to the said
5 $8,000.00, which position or contention these petitioners are not able to deny, unless the Sand Filtration Corporation is correct in its contention that May and Jekyll do not receive the said

$8,000.00 unless the said Dean and the said Sand Filtration Corporation shall realize a profit out of the said prosecution of the work.

Sixth. As your peticioners are advised and believe, and therefore aver, the construction of the said contracts of August 25th, 1903, contended for by the said Sand Filtration Corporation is wholly untenable, and constitute no colorable ground upon which the receiver should refuse to pay over either the said $10,000.00 or the said $8,000.00; and that the only colorable ground for the receiver not to pay over to your petitioners any part of either of the said sums is the contention in regard to the said item of $1,190.00, growing out of the alleged duplication in the schedule of assets above stated. In respect to this item, your petitioners are unable to state whether such duplication in fact occurred or not, and as they are advised and believe, and therefore aver, it is a matter in which they are not particularly interested, since, if such duplication did occur, and a deduction therefore is proper to be made, as claimed, such deduction should be made from the $8,000.00 which May and Jekyll claim to be due them, so that the deduction, whether allowed or disallowed, will not affect the right of your petitioners to an immediate payment to them of their said $10,000.00, now in the hands of the receiver.

Seventh. Your petitioners have repeatedly requested that the said receiver should file his report in this cause, setting out the contentions of the Sand Filtration Corporation, and praying the instructions of this court as to his duty in the premises with respect to the payment now as aforesaid held up by him, but he has thus far failed and refused to do so. His said refusal, as your petitioners are further informed, advised and believe, arise wholly from the said contentions of the said Sand Filtration Corporation, and their insistence that the said receiver, in his said report and application for instructions, should state that these petitioners have realized no profits from their said contract with the Government, which allegation, as they are informed and believe and therefore aver, the receiver has been unable to make, and has yet been unwilling to assert the contrary in view of the position of the Sand Filtration Corporation in that regard, and your petitioners are accordingly compelled to make this application to the court for such action as may properly authorize and require said receiver to make payment to them of the said amounts so held by him.

Wherefore, and because they are without other adequate remedy, your petitioners pray as follows:

1. That a rule may be issued by this honorable court against the said John D. Macfarlan, the receiver herein appointed, requiring him to show cause on or before a day to be by the court fixed, why he should not pay to the petitioners the $10,000.00 in his hands, to which they are entitled under the said hereinbefore-mentioned contracts and agreements, and why he should not pay to them the
6 further sum of $8,000.00 which, under the said agreements, they are to receive for the benefit of the said May and Jekyll.

2. That a rule may further be served upon the said May and Jekyll, and upon the said Sand Filtration Corporation to show cause,

if any they have, and if they so desire, why the said receiver should, or should not, make payments of the said sum of $10,000.00 and $8,000.00 for the benefit of your said petitioners and the said May and Jekyll respectively, and that the cause may be referred to the auditor, or to an Examiner in Chancery, to take testimony as to any disputed questions of fact, if necessary, which may be raised by the answers of the said receiver, the said May and Jekyll and the said Sand Filtration Corporation, to said rule.

3. That the said receiver being now at Palm Beach, Florida, and the said Sand Filtration Corporation being no longer engaged in carrying on business in the District of Columbia, having their principal offices in Providence, Rhode Island, the court may by its order direct the manner in which the said rule or rules or such other order or orders as it may pass, upon consideration of this petition, may be served upon the said receiver and the said Sand Filtration Corporation. The said May and Jekyll, also, are non-residents of the District of Columbia, but your petitioners are informed, believe, and therefore aver, have counsel resident in the District of Columbia who is authorized and willing to accept service, and to make answer in their behalf.

4. That your petitioners may have such other and further relief as the nature of the case may require.

S. P. COWARDIN,
THOS. E. STAGG,
S. P. CLAY,
JAMES F. BRADLEY.
Per J. J. DARLINGTON,
His *Solicitor.*

J. J. DARLINGTON,
Sol. for Petitioners.

STATE OF VIRGINIA, *County of Henrico, ss:*

I, S. P. Cowardin, on oath say that I am one of the above-named petitioners, and make this affidavit on behalf of myself and my co-petitioners therein named; that I have read the said foregoing petition and know the contents thereof, that the allegations therein set forth as of my personal knowledge are true, and that those set forth upon information and belief I believe to be true.

S. P. COWARDIN.

Subscribed and sworn to before me this 6th day of March, A. D. 1906.

S. P. JONES,
[SEAL.] *Notary Public.*

My commission expires M'ch 31, 1906.

Under the laws of Virginia no tax is charged on this seal.

S. P. J.

7 *Rule to Show Cause.*

Filed March 13, 1906.

In the Supreme Court of the District of Columbia.

No. 24167. Equity.

THOMAS E. STAGG
vs.
SAMUEL P. COWARDIN ET AL.

Upon consideration of the petition of the complainant and the defendants in the above-entitled cause, this day filed, it is by the court this 13th day of March, A. D. 1906, ordered that John D. Maclennan, the Receiver herein appointed, Robert H. May, George E. Jekyll and Arthur B. Jekyll, trading as May & Jekyll, and the Sand Filtration Corporation, show cause, on or before the 23rd day of March, A. D., 1906, at ten o'clock, A. M. why an order should not be passed in this cause requiring the said John D. Maclennan, Receiver, to pay to the firm of Cowardin, Bradley, Clay & Company the sum of Ten thousand dollars ($10,000.00) and to the firm of May & Jekyll the sum of Eight thousand dollars, ($8,000.00) out of the moneys received by said Receiver from the United States Government as final payment on the Filtration Plant contract; provided that within two days from the date hereof, copies of this order be mailed, by registered letter, respectively, to John D. Maclennan, Palm Beach, Florida, and to the Sand Filtration Corporation, Providence Rhode Island, and provided that service of a copy hereof be accepted by the said firm of May and Jekyll, either personally or through counsel.

HARRY M. CLABAUGH,
Chief Justice.

Service of copy of above rule accepted this 13th day of March, 1906.

TUCKER & KENYON,
Sol's for May & Jekyll.

Answer of John D. Maclennan.

Filed April 2, 1906.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 24167.

THOMAS E. STAGG, Complainant,
vs.
SAMUEL P. COWARDIN ET AL., Defendants.

Answer of John D. Maclennan, Receiver, to the rule to show cause issued in this cause on the 13th day of March, 1906, upon the
8 petition of Samuel P. Cowardin, James B. Bradley, Sidney P. Clay and Thomas E. Stagg.

For answer to said rule to show cause, this respondent answering said petition says:

1–4. He admits the averments of the first, second, third and fourth paragraphs of said petition to be substantially correct.

5–6. He admits that there is in his hands, as Receiver, as aforesaid, the sum of $18,000.00, made up of the two amounts of $10,000.00 and $78,000.00, respectively, referred to in said fifth paragraph. He admits also that he has retained said sums because of objections made to his paying out the same by counsel for the Sand Filtration Corporation of America. He is advised that it is not necessary for him to state in full the contentions of said Filtration Corporation in this regard, because he is advised that the claims of said Sand Filtration Corporation will be fully set forth in their answer to said rule to show cause.

7. This respondent admits that he has been requested several times by the petitioners, or their counsel, to file a report in this case, setting out the contentions of the Sand Filtration Corporation of America in regard to said sums of $8,000.00 and $10,000.00, respectively, and praying this Court for instructions in the premises, and he admits that he has not filed any such report. He avers, however, that for several weeks he was diligently engaged in endeavoring to frame such a report, so that the same would be satisfactory to counsel for all the parties in interest, and that in the end he found that it was impossible for said counsel to agree and he was, therefore, advised that it was proper for him to allow the questions involved to be raised before the Court by the respective parties in such manner as they, or their counsel might deem proper. He now, as at all times, holds said sums of money subject to the order of the court, and has not paid out the same, because there was a contention, in regard to it, and he was advised that that being so, it was his duty to protect the rights of all parties by retaining the money until the differences between them should be determined by the court.

JNO. D. MACLENNAN.

I, John D. Maclennan, on oath say that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts therein stated of my own knowledge are true and that those stated as upon information and belief, I believe to be true.

JNO. D. MACLENNAN.

Subscribed and sworn to before me this 2nd day of April, A. D., 1906.

WILLIAM K. QUINTER,
Notary Public, D. C.

[SEAL.]

9 *Answer of Robert H. May, George E. Jekyll, and Arthur B. Jekyll.*

Filed April 2, 1906.

In the Supreme Court of the District of Columbia, Holding an Equity Court for Said District.

In Equity. No. 24167.

THOMAS E. STAGG, Complainant,
vs.
SAMUEL P. COWARDIN ET AL., Defendants.

Answering the rule heretofore laid upon them to show cause, if any they have, why the receiver in the above entitled cause should, or should not, make payment to them of the sum of eight thousand dollars ($8,000.00) mentioned in the petition of said defendants for said rule, these respondents, Robert H. May, George E. Jekyll and Arthur B. Jekyll, trading under the firm name of May and Jekyll, respectfully show unto the Court as follows, to wit:

1. These respondents know of no reason why said sum of eight thousand dollars ($8000) should not be paid to them, but on the contrary aver and insist that said sum is rightfully due and owing to them and should be paid to them forthwith out of the moneys retained in the hand of said receiver.

2. Specifically answering section (*b*) of paragraph five of the petition for said rule, which is the only part or portion of said petition which these respondents are advised it is necessary for them to answer, these respondents aver that they know of no duplication of assets such as is alleged in said section and paragraph, and they further aver that even if there were such duplication, which they hereby expressly deny, that that would afford no ground whatever for the failure or refusal of said receiver to pay to these respondents the said sum of eight *hundred* dollars ($8000) out of the moneys in his hands, in that by the terms of the contract between these respondents and said defendants, Cowardin, Bradley, Clay and Company, of August 25th, 1903, their obligation to pay said sum of eight thousand dollars ($8000) to these respondents was expressly recognized and conditioned only upon their making a net profit out of

the Sand Filtration contract with the Government, which net profit sufficient to pay said claim they now admit was made by them; and that said contract was in effect and in law an account stated between said defendants Cowardin, Bradley, Clay and Company and these respondents. These respondents, further answering said section and paragraph, aver that under the circumstances surrounding the making of said contract of August 25th, 1903, even if there had been such duplication of assets (which these respondents again expressly deny), by such duplication the said defendants, Cowardin, Bradley, Clay and Company were in no wise damnified and suffered no possible loss thereby and it would be unjust and inequitable by reason thereof to make any deduction from said sum of eight thousand dollars ($8000) justly due and owing as aforesaid to these respondents. So far as any other of the parties to this cause are concerned there was and is absolutely no privity of contract or otherwise between them and these respondents.

3. Further answering, these respondents aver that said eight thousand dollars ($8000) was by the terms of said contract of August 23rd, 1903, to be paid by said Cowardin, Bradley, Clay and Company to these respondents conditioned only upon the making of a net profit by said defendants from said Sand Filtration contract, the making of which net profit sufficient to pay said claim is admitted by said defendants; and was not in any way conditioned upon the making of net profit from said contract by any other person or persons or corporation whatever.

4. These respondents, while expressly denying that there is any reason whatever why said eight thousand dollars ($8000) should not be paid to them forthwith by said receiver, consent to the reference of this cause to the Auditor or to an examiner in chancery to take testimony upon any disputed question of fact, if there should be any, and if the Court may think it necessary and expedient that such reference should be made. They also request leave to answer any contention antagonistic to their interests which may be made in any answer to said rule which may be filed by any parties to this cause before or after the coming in of this answer to said rule.

ROBERT H. MAY,
GEORGE E. JEKYLL,
ARTHUR B. JEKYLL,
Respondents,
By C. C. TUCKER, *Their Att'y.*

TUCKER & KENYON.
Solicitors for Respondents.

Answer of Filtration Corporation of America.

Filed April 2, 1906.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 24167.

THOMAS E. STAGG, Complainant,
vs.
SAMUEL P. COWARDIN ET AL., Defendants.

Answer of The Sand Filtration Corporation of America to the rule to show cause issued herein on the 13th day of March, 1906, upon the petition of Samuel P. Cowardin, James B. Bradley, Sidney P. Clay and Thomas E. Stagg.

For answer to said rule to show cause this respondent answering said petition says:

1–4. It admits to be true the averments of the first, second,
11 third and fourth paragraphs of said petition, except that while it is advised that the petitioners have correctly set forth the substance of the several written agreements referred to in said petition, so far as the same is material, out of abundant caution they refer to said agreements, or copies thereof, on file in this case, and make them a part of this answer.

5. It admits that the Receiver in this case holds the amounts of $10,000.00 and $8,000.00, respectively, and that said Receiver has declined to pay the same to the petitioners, because this respondent has notified said Receiver that it objects to such payment. So far as respondent's objection applies to the sum of $500.00, a premium paid by it, the objection made by this respondent is correctly set forth in said petition.

As to the sum of $8,000.00 in said fifth paragraph of said petition referred to, it is true that the respondent has objected to the payment of the same by said Receiver to the petitioners upon two grounds: (1) That there was a duplication in the schedule of mules constituting part of the assets referred to in said paragraph amounting to $1190.00; and, (2) That under the terms of the contract of August 25th, 1903, between the petitioners and Henry B. Dean, doing business under the firm name of Dean and Shibley (to the rights and liabilities of which firm the respondent has succeeded) and under the contract of the same date between the petitioners and the firm of May and Jekyll, the petitioners are not entitled to said sum of $8,000.00.

Further answering said fifth paragraph of said petition, this respondent avers the fact to be that no profits were realized from the construction or erection of that portion of the filtration plant referred to in said petition, which the petitioners contracted with the United States to construct or erect. After said contract of August

25th, 1903, were entered into, the work under said contract was finished by said Dean, or by this respondent, as his successor, at a loss of not less than one hundred thousand dollars. If the sum of $65,000.00, which by the terms of said contract of August 25th, 1903, between the petitioners and said Dean, had been wholly retained by said Dean, or by this respondent as his successor, their loss in carrying out said contract would still be more than $8,000.00.

This respondent is advised and avers that under these circumstances there is no liability on the part of the petitioners to pay to the firm of May and Jekyll said sum of $8,000.00, or any part thereof; and further they are advised and aver that even if the petitioners be required by the true construction of their contract of August 25th, 1903, with said May and Jekyll to pay said sum of $8,000.00 to said May and Jekyll, neither said Dean, nor this respondent, as his successor, is required to pay said sum, or any part thereof, to the petitioners.

The respondent further avers that it is true that in turning over the assets of said firm of May and Jekyll, through the petitioners to this respondent, by inadvertence, there was a duplication of assets of the value of $1190.00, and they are advised and aver that this being so, the respondent is entitled to have that sum paid to it by the Receiver out of the money which would otherwise be payable to the petitioners.

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Further answering said fifth paragraph of the petition the respondent is advised and avers that if by the true construction of the contracts hereinabove referred to, the petitioners are required to pay said sum of $8,000.00 to said firm of May and Jekyll, and this respondent is not required to pay said sum of $8,000.00, or any part thereof, to the petitioners, then said sum of $8,000.00 should be paid out of the sum of $10,000.00 referred to in said petition, held by said Receiver, over and above said sum of $8,000.00, and that therefore, it is necessary that said Receiver should retain in his hands both the said sum of $10,000.00 and said sum of $8,000.00, until the final determination of the matters so in dispute.

6. As to the sixth paragraph of said petition, the respondent says that it sets forth only matters of law which this respondent is not required to answer and that the position of the respondent in regard to said questions is sufficiently indicated in its answer to the preceding paragraph.

7. On information and belief, the respondent admits that the petitioners on several occasions have requested the Receiver in this case to file his report, setting out the contentions of this respondent, and praying the instruction of the court as to his duty in the premises, and they further admit that said Receiver has not filed any such report. But partly upon information and belief, and partly upon personal knowledge, the respondent avers that said Receiver in good faith, by consultation with counsel for the respective parties in interest, has endeavored to have said counsel agree upon a statement of facts to be included in his report, which would fully and fairly show their respective contentions, and that after much correspondence between, and conferences with, counsel

for the respective parties no agreement was reached, and said Receiver was, therefore, unable to carry out his intentions in that regard.

THE SAND FILTRATION CORPORATION OF AMERICA,
By JNO. G. HANRAHAN, *Treasurer.*

A. S. WORTHINGTON,
Solicitor for the Sand Filtration Corporation of America.

I, John G. Hanrahan, Treasurer of The Sand Filtration Corporation of America, on oath say that I have read the foregoing answer signed by me as Treasurer of said Company, and know the contents thereof; that the facts therein stated of my personal knowledge are true and that those stated as upon information and belief, I believe to be true.

JNO. G. HANRAHAN.

13 Subscribed and sworn to before me this 2nd day of April, A. D., 1906.

[SEAL.] WILLIAM K. QUINTER,
Notary Public, D. C.

Stipulation.

Filed April 2, 1906.

In the Supreme Court of the District of Columbia.

No. 24167. Equity.

THOMAS E. STAGG
vs.
SAMUEL P. COWARDIN ET AL.

It appearing that no copies of the agreement between Cowardin, Bradley, Clay and Company and May and Jekyll, of the 25th day of August 1903, or the agreement between Cowardin, Bradley, Clay & Company and Henry B. Dean of the 25th day of August, A. D., 1903, or the supplemental agreement between the last named parties of August 27, 1903, are on file in the above-entitled cause, as assumed in the petition for a rule on the Receiver filed therein and the answers thereto, it is hereby stipulated that the copies of the said several instruments hereto annexed, marked, respectively, Exhibits A, B and C, shall be filed in said cause, and may be read, referred to and considered as evidence therein for the purposes of the said petition and of the proceedings thereunder.

J. J. DARLINGTON,
Sol. for Cowardin, Bradley, Clay & Stagg.
MAY & JEKYLL,
By TUCKER & KENYON,
Their Sol'rs.
A. S. WORTHINGTON,
Sol. for Sand Filtration Company of America.

Exhibit B.

Filed April 2, 1906.

Contract to Sell Construction Plant Located upon the Filter Plant in Construction in the District of Columbia and to Make Divers Arrangements in such Connection.

Whereas the co-partnership of Cowardin, Bradley, Clay and Company, composed as hereinafter stated, holds the certain contract entered into under date of April 6th, 1903, between said co-partnership and Lieutenant-Colonel A. M. Miller, of the United States Army, acting in behalf of the United States for excavation and other
14 work upon the filter plant, now being constructed in the District of Columbia, to filter the water supply of the City of Washington and vicinity;

And whereas, said co-partnership has acquired and now owns the divers articles of construction plant specified in schedule A hereto attached and made part hereof and referred to for full contents and particulars; which construction plant was acquired through May and Jekyll, who were employed by said Cowardin, Bradley, Clay and Company to do the excavation and other work aforesaid in a written memorandum of agreement dated May 26th, 1903, and also through certain trustees mentioned in said memorandum of agreement; and said construction plant and the several articles constituting the same are subject only to the obligations of the said May and Jekyll specified in Schedule B hereto attached and made part hereof and referred to for full contents and particulars, and are subject to a certain chattel trust to secure said indebtedness and are subject to no other lien, incumbrance or claim whatsoever.

And whereas, said Cowardin, Bradley, Clay and Company are financially unable to proceed with their contract aforesaid with the United States, and are otherwise in a condition warranting the appointment of a receiver to wind up the affairs of the said firm and to carry out and perform said contract.

And whereas, the said firm of Cowardin, Bradley, Clay and Company have entered into a contract with May and Jekyll, dated August 25th, 1903, whereby the contract theretofore existing between the two said firms has been cancelled and discharged and certain other rights and obligations have been created by the said contract, which the grantees are by this instrument to assume.

And whereas, the said co-partnership of Dean and Shibley, composed as hereinafter stated, are interested in the formation of the Sand Filtration Company of America, now about to be incorporated and organized under the laws of Virginia, and are desirous for said contemplated corporation to acquire the construction plant aforesaid upon condition that said corporation, or until it be formed, said co-partnership, be employed and engaged to do the excavation and other work remaining to be done to complete the contract aforesaid with the United States; and said Cowardin, Bradley, Clay and Com-

pany deem it to be for their best interests and for the best interests of all concerned that such an arrangement should be made with the Receiver, should one be appoint-

Now therefore know all men by these presents: That Samuel P. Cowardin, James F. Bradley, Sidney P. Clay and Thomas E. Stagg, now composing the co-partnership aforesaid, doing business under the firm and name of Cowardin, Bradley, Clay and Company, hereinafter designated the grantors, party hereto of the first part, in consideration of the undertakings, engagements and requirements hereinafter contained, do hereby bargain, sell and agree to sell, to Henry B. Dean, doing business under the firm and name of Dean and Shibley, hereinafter designated the grantee, party hereto of the second part all and singular the articles of the construction plant specified in Schedule A aforesaid and also all and singular all other
15 construction plant and property required by the grantors from the said May and Jekyll and also from the Trustees named in the memorandum of agreement with May and Jekyll, dated May the 26th, 1903, located upon or near the place where the excavation and other work aforesaid is being done in the District of Columbia, and also all rights, contracts and franchises and easements appertaining hereto and in whatsoever way required, for the consideration and upon the terms and conditions and subject to the agreements restrictions and limitations following, that is to say:

First. The foregoing sale and agreement to sell shall take effect only when and if, within twenty days after the date hereof, John D. Maclennan of Cleveland, Ohio, or some other suitable person or persons satisfactory to the grantee shall be appointed receiver of Cowardin, Bradley, Clay and Company by and in an order of a court of competent jurisdiction, which order shall authorize the prosecution and completion by the receiver of the work under the contract aforesaid, with the United States, and shall also authorize the employment and engagement by the Receiver of the said The Sand Filtration Company of America or, pending its organization, of said grantee, upon terms and conditions consistent with this contract to sell; and if such receiver with such authority is not appointed within such time, this contract to sell and all its parts and provisions shall be null and void without obligation or duty, liability or right of one party towards or against the other.

Second. If, within said time, said receiver shall be so appointed, with such authority, then, as soon as practicable after his appointment, a contract shall be made between him as such receiver and the said The Sand Filtration Company of America, or pending its organization with the grantee, in which said receiver shall employ and engage said company, or, during such interim, the grantee, and said company, or the grantee shall undertake, engage, and agree to perform, carry out and complete the contract aforesaid with the United States in accordance with the terms and conditions of the said contract and the drawings, plans and specifications herein referred to, subject only to changes which may be made pursuant to said contract, which hire and employment shall be for and in consideration of the payment by such receiver to said company, or pending its organization, to the grantee or all sums which are and shall become

payable by the United States or any officer thereof, for work done and materials furnished pursuant to said contract, after deducting from such payments such amounts as shall be required to pay the costs and expenses, and necessary outlay incident to the receivership and the cause in which the receiver shall be appointed. And upon the condition aforesaid that said receiver be appointed with such authority, the grantee now hereby promises and agrees that said, The Sand Filtration Company of America, or, pending its organization, the said grantee, shall and will make and enter into said agreement with said receiver, to do, perform and complete said work including the payment of all claims for labor and material, and shall and will also give bond for the faithful performance thereof in the penal sum of $150,000 with a solvent
16 surety company as surety thereon; said bond and surety to be approved by the court appointing said receiver.

Third. Upon the execution of such contract with the receiver and the execution and approval of such bond to secure the performance thereof, title to the construction plant aforesaid shall at once pass to and vest in the grantee for said The Sand Filtration Company of America, and shall be transferred to said company as soon as it is organized and capable of receiving the same; the possession of such construction plant and every part thereof shall be delivered immediately to the grantee, or said company, and the grantee or said company may, with such force as may be necessary take possession and hold the same.

Fourth. As consideration for the construction plant by this instrument acquired by the grantee, or The Sand Filtration Company of America, the grantee until the said The Sand Filtration Company of America has been organized and substituted and thereafter the said last named company, assume and agree to pay all the debts of May and Jekyll specified in Schedule B hereto attached and — a part hereof, when and as they or it may arrange with the several creditors, and in general to comply with the provisions and conditions of one certain agreement entered into between the grantors and said May and Jekyll, a copy of which is hereto attached and to be read as a part hereof, including among other provisions the payment of the sum of $8000 to the said May and Jekyll as in said agreement is provided, and the payment of which is also assumed by the said grantee; and also to pay to the receiver the sum of $65,000, to be distributed thereafter as the court may direct, which said sum of $65,000 shall become due and payable as follows: the sum of $10,000 on September 15th, 1903, $15,000 on January 15th, 1904, $10,000 on March 15th, 1904, $10,000 on May 15th, 1904, and the remaining $20,000 on the completion of the said filtration plant and at the time of the final payment thereon by the United States; and the said grantee, and the Sand Filtration Company of America, when said company shall have been substituted for the said grantee, shall also pay to the grantors or their attorney for them the sum of $3,517.50—said sum having been paid by the grantors on account of pay roll and other expenses since the commencement of negotiation between the parties hereto, and

further to pay all other expenses and obligations necessary to be incurred between the date of this contract and the execution of the formal contract with the receiver hereafter to be appointed for the grantors.

It is further agreed that all expenses, costs and fees of receivership and of the cause in which the receiver is appointed are to be borne by the grantors, or to be defrayed by the receiver out of the funds which may come into his hands for them.

Fifth. The grantors warrant their title to all and singular the articles of construction plant enumerated in schedule A and they further warrant that said articles and every thereof are free and clear of all liens, encumbrances and claims and charges of every kind and description, excepting only the debts enumerated in Schedule
17 B, and the chattel trust securing the same; and the grantors further represent, covenant and agree that all of the indebtedness of said firm of Cowardin, Bradley, Clay and Company which may come against the receivership thereof, excepting the items comprising the sum of $3,517.50 above provided for, do not exceed in amount the sum of $65,000.

Sixth. It is understood and agreed that in making this contract, the grantee acts for said The Sand Filtration Company of America, and as its representative solely until it shall be incorporated and organized and shall assume the obligations hereof and that he, said grantee, shall not be liable or responsible in any manner, to any extent, or, for anything whatsoever after said The Sand Filtration Company of America shall have been so incorporated and organized and shall have assumed the obligations hereof and of the contract to be made with the receiver as herein provided; and shall give a substituted bond for the performance thereof; It being the intention that after such incorporation, organization and assumption, this contract to sell shall have the same effect as though made directly with said The Sand Filtration Company of America in the place of the grantee above named.

Seventh. The grantors further covenant and agree to protect, indemnify and save harmless the grantee or The Sand Filtration Company of America when the said company shall have been substituted for the said grantee, from any and all loss or injury, damage or liability that may result to him or it from the fact that Michael Kelly, one of the parties to the original contract with the Government of the United States of date April 6th, 1903, is not a party to this instrument.

In witness whereof the parties aforesaid have signed and sealed these presents in duplicate in the City of Washington, District of Columbia, on this 25th day of August, 1903.

S. P. COWARDIN,
JAMES F. BRADLEY,
SYDNEY P. CLAY,
THOMAS E. STAGG,
Grantors.

HENRY B. DEAN,
Trading under Firm Name of Dean and Shibley, Grantee.

EXHIBIT C.

Filed April 2, 1906.

Whereas in the agreement between Cowardin, Bradley, Clay and Company of the first part and Henry B. Dean of the second part, bearing date the 25th day of August, 1903, and in the accompanying paper certain stipulations are contained which are apparently capable of inconsistent constructions to remedy which and more perfectly express the true intent and meaning of the said parties, this supplemental agreement is made, it is hereby fully agreed as follows:

18 1. That the Receiver is authorized to deduct from the moneys paid to him by the Government as the work progresses, and in instalments as specified in the said agreement between the parties, the sum of $65,000 and the sum of $8,000 therein mentioned, paying the same directly to the parties of the first part, instead of first paying to the parties of the second part and then receiving them back from the parties of the second part as is apparently provided in the said agreement of August 25th.

2. The sum of $3,517.50 provided in said agreement to be paid by the party of the second part to the parties of the first part, or their attorney, should be paid in cash, and simultaneously with the execution of the contract between the Receiver and the party of the second part provided for in said agreement of August 25th, 1903.

3. That if the Receiver's certificates shall be issued by an order of the court they shall specify on their face that neither of the parties of the first part nor their individual property or assets as distinguished from their partnership assets shall be in any manner liable for the payment of the said Receiver's certificates.

In witness whereof the parties hereto have hereunto set their hands and seals in duplicate this 27th day of August, 1903.

(Signed) SAMUEL P. COWARDIN,
JAMES F. BRADLEY,
SYDNEY P. CLAY,
Parties of the First Part.

——— ———,
Party of the Second Part.

EXHIBIT B ATTACHED TO RECEIVER'S REPORT.

Filed February 8, 1904.

This contract, made and entered into this 27th day of August, 1903, by and between John D. Maclennan, Receiver of Cowardin, Bradley, Clay and Company, hereinafter called the Receiver, party of the first part and Henry B. Dean, doing business as Dean & Shibley, party of the second part,

Witnesseth: That, pursuant to authority conferred by the certain order of the Supreme Court of the District of Columbia, made and

entered on August —, 1903, in the cause in equity wherein Thomas E. Stagg, is plaintiff and Samuel P. Cowardin and others are defendants, wherein said John D. Maclennan was appointed by said court Receiver of said Cowardin, Bradley, Clay and Company, the Receiver hereby hires, employs and engages said Henry B. Dean, trading under said firm and name of Dean & Shibley, until the Sand Filtration Company of America shall be organized and shall assume this Agreement and give bond as hereinafter provided and thereafter said Company and said Henry B. Dean, until said Company shall be organized and shall assume this Agreement and give such bond, and thereafter The Sand Filtration Company of America, accept such employment, and engage and undertake to furnish all materi-
19 als and labor and do all things, and also to provide and pay for all construction plant necessary and proper to complete and fully perform the certain contract, dated, April 6th, 1903, between Lieutenant Colonel A. M. Miller of the United States Army acting for the United States and the co-partnership of Cowardin, Bradley, Clay and Company, relating to excavation and other work upon the filter plant now being constructed in the District of Columbia to filter the water supply of the City of Washington, and vicinity, and so to complete and fully perform said contract in strict accordance with the requirements thereof, and the drawings, plans and specifications therein referred to: which hiring employment, engagement and undertaking are for the consideration and upon the terms and conditions following, that is to say:

First. The work shall be carried on, and all labor and materials done and furnished, under the inspection and approval provided for in said contract with the United States, a copy of which, marked Exhibit "A" is hereto attached and made a part hereof and referred to for full contents and particulars; and the decision of the officer in charge shall have the same effect and shall be complied with to the same extent as in said contract provided and prescribed.

Second. If and when said The Sand Filtration Company of America shall be incorporated and organized and shall assume this contract and give bond to secure the performance thereof, said Henry B. Dean shall be deemed to be acting solely as the representative and in interests of said Company, and shall be absolved and released from further duty, obligation or liability hereunder, and said Company shall be fully substituted in the place of said Dean and be bound hereby in the same way and to the same extent as though it were now the original party hereto of the second part; and the phrase "party hereto of the second part" shall be so construed as to designate said Dean until such full assumption hereof by said Company, and thereafter to designate said Company.

Third. The party hereto of the second part shall pay all debts and liabilities incurred for materials or labor, shall provide an adequate construction plant to do the work, shall pay therefor and shall keep the work and every part thereof clear of debts, liens and incumbrances.

Fourth. For all labor and materials furnished and to be furnished, and all services, acts, and things rendered, done and performed by

the party of the second part to complete and perform this contract and the contract aforesaid with the United States, said party shall be entitled to receive, and the Receiver shall pay to said party the amounts which the Receiver shall receive from time to time from the United States under and pursuant to the contract aforesaid with the United States from which amounts paid by the United States, however, the Receiver shall deduct the amounts to be paid to or for the benefit of Cowardin, Bradley, Clay and Company, as provided for in the certain Contract to Sell, dated August 25th, 1903, between said Cowardin, Bradley, Clay and Company and the party hereto of the second part. And to assist the party of the second part in such work by providing and furnishing the evidences of the
20 amounts of labor, materials and construction plant furnished from time to time in excess of the amounts payable and paid from time to time by the Receiver to the party of the second part, and to assure as far as practicable the payments of such excess amounts, said Receiver shall execute and deliver to the party of the second part certificates payable to order or bearer charging such excess amounts upon all the assets and effects of the Receivership, excepting the sum of Sixty-five thousand Dollars ($65,000) or any part of it and the other amounts specified to be paid by said party hereto of the second part to or for the benefit of said Cowardin, Bradley, Clay and Company to the Contract to Sell aforesaid, which amounts and obligations and every part thereof shall at all times be wholly free and clear of any lien, charge or claim, created under or pursuant to this contract, and cost incident to preparing, executing, issuing and cancelling such certificates and also shall pay and satisfy all compensation and commissions of said Receiver; the said Cowardin, Bradley, Clay and Company being hereby absolved from all liability therefor.

Fifth. Said Henry B. Dean shall within five days hereafter give bond for the faithful and full performance of this contract in the sum of One hundred and fifty thousand Dollars ($150,000) with a surety company or companies to be approved by the Court; which bond shall be cancelled when said The Sand Filtration Company of America shall give bond of like tenor and effect and covering the same time, in the same amount and with a surety company or companies approved by the court.

In witness whereof, said parties have signed and sealed these presents this 27th day of August, 1903, the approval having been first had and obtained.

——. [SEAL.]
——. [SEAL.]
——. [SEAL.]

Decree.

Filed April 3, 1906.

In the Supreme Court of the District of Columbia.

No. 24167.

THOMAS E. STAGG
vs.
SAMUEL P. COWARDIN ET AL.

This cause coming on to be heard upon the petition of Samuel P. Cowardin, James F. Bradley, Sydney P. Clay and Thomas E. Stagg for a rule upon John D. Maclennan, Receiver, The Sand Filtration Corporation of America, and Robert H. May, George E. Jekyll and Arthur B. Jekyll, trading under the firm name of May and Jekyll, to show cause why the said Receiver should not pay
21 to the said petitioners the sum of Ten thousand dollars ($10,000) balance of the Sixty-five thousand dollars ($65,000) to which they are entitled under the contract between said Receiver and said Sand Filtration Corporation, appearing of record in this cause, and why the said Receiver should not, further, pay to the petitioners, or to May and Jekyll, the Eight thousand dollars ($8,000) also referred to in said contract, and the said cause having been duly heard upon the said petition and the answers thereto of the said Sand Filtration Corporation and the said May and Jekyll; having been argued by the solicitors for the said parties, respectively, and duly considered, it is thereupon by the Court this 3rd day of April, A. D., 1906, adjudged, ordered and decreed that the said Receiver do forthwith pay to said petitioners, or to their solicitor of record, Eight thousand dollars ($8,000) out of the said sum of Ten thousand dollars ($10,000) claimed by them to be due under the said contract, reserving the remaining Two thousand dollars ($2,000) thereof subject to the court's further order upon the coming in of the Auditor's report upon the reference hereinafter directed.

And, it appearing to the court that the petitioners have derived a profit under their contract with the United States Government from the construction of the filtration plant, within the intent and meaning of the contract between them and the firm of May and Jekyll of August 25, 1903, but the Court being unable, in the present state of the record, to determine the question whether there was an error of $1190 arising from a duplication in the schedule of the assets of the May and Jekyll Company by them turned over to the petitioners, and by the latter to the Sand Filtration Corporation as claimed by said corporation, so that a final decree can not be made at this time, it is thereupon by the court ordered that this cause be, and the same hereby is, referred to the Auditor of the Court to take such testimony as may be adduced before him by the parties in respect thereto, and to submit the same with his report

thereon, and, also, upon the expense of the receivership as early as may be practicable so to do.

HARRY M. CLABAUGH,
Chief Justice.

Auditor's Report.

Filed August 2, 1906.

In the Supreme Court of the District of Columbia.

Equity. No. 24167.

THOMAS E. STAGG
vs.
SAMUEL P. COWARDIN ET AL.

This cause is referred to me to take testimony and report whether there was an error of $1190 arising from a duplication in the
22 schedule of the assets of the May and Jekyll Company, by them turned over to the petitioners, Samuel P. Cowardin and others, and by them to the Sand Filtration Corporation, as claimed by the said corporation; also to report on the expenses of the receivership. After due notice I proceeded with the reference.

The firm of Cowardin, Bradley, Clay & Co., who will be hereafter referred to as the Cowardin Company were contractors for supplying the labor and materials for the construction of the Filtration Plant for the City of Washington, under a contract dated April 6th, 1903. On the 26th of May 1903, the said company entered into a contract with parties doing business under the firm name and style of May and Jekyll, by which the last named firm were employed by the Cowardin Company to provide all the work, labor and material necessary to complete the contract, together with a plan adequate to enable them to do so, and proceed with and finish the said Filtration Plant under the contract of the Cowardin Company. May and Jekyll undertook and agreed to assume and pay certain existing obligations incurred by said Cowardin Company as described in a certain schedule annexed to said contract.

May and Jekyll further agreed to pay over to Joseph J. Darlington and Charles Towles Tucker, Trustees, the sum of $50,000 to be expended in the purchase of a plant to be purchased in the name of the said trustees, and used for the purpose of carrying out said contract with the United States. It further provided that the said plant should consist of certain articles and implements already purchased or contracted for by the Cowardin Company and set forth and described in another certain schedule annexed to said agreement and marked B, and such additional implements and articles as might be selected by the said May and Jekyll.

Among the articles enumerated in Schedule B of the said agreement, I find an item of

"Wheel scrapers, $1,873.92"

and another item as follows:

"Mules (50 at $191.97 each) $9,598.50."

These wheel scrapers and mules formed a part of the plant which was purchased by the trustees in accordance with the agreement.

In another portion of the same schedule there appears a list of amounts due on account of said plant, among which I find, as due for wheel scrapers, three notes each for the sum of $383.00, bearing date May 1st, 1903 and payable in one, two and three months the notes aggregating $1149.00. Other amounts due on account of plant as set forth in the said schedule, were for mules purchased by the Cowardin Company and delivered as part of the plant referred to in the agreement. All the parties seem to have proceeded under the said agreement until the 25th of August 1903, when a new contract was made between the partners of the Cowardin Company and the firm of May and Jekyll by which the agreement of May 26th 1903 was cancelled, and it was declared that all of the obligations of the parties thereto, to each other were finally discharged.

The Cowardin Company agreed to assume themselves, and
23 to procure the assumption by any other parties who might undertake to complete the contract with the United States, of all the debts and liabilities of the said May and Jekyll as set forth in a schedule annexed to the said agreement and marked Schedule A.

In consideration of the obligations assumed by the Cowardin Company, May and Jekyll by the said agreement, transferred to the said Cowardin Company all of the right, title and interest of May and Jekyll in and to all contracts etc. and in and to all the articles of personal property on the site of the Filtration Plant, and agreed to procure from the trustees, Darlington and Tucker, a bill of sale of that portion of the said articles, the title to which was vested in the said trustees, a schedule of all of the said articles of personal property being attached to the agreement and marked Schedule B. In the latter schedule there appears the following item, "Live stock $1,142.46." Note: The words, "Live stock" are printed in type and the following is in writing in parenthesis, "50 mules." This writing, as now appears, was inserted by one of the trustees holding the title to the plant which had been transferred to them by the Cowardin Company under the agreement of May 26th 1903 and was only intended to identify the animals received by the trustees or for which they were accountable.

On the said 25th of August the Cowardin Company entered into an agreement with Dean and Shibley by which the latter undertook the completion of the work under the contract with the United States and to pay the obligations then existing, and the Cowardin Company agreed to deliver or cause to be delivered all the articles of personal property making up the plant used in the said construction at that date, and identified these articles in a schedule marked B attached to the agreement of August 25th between the Cowardin Company, and May and Jekyll, the obligations assumed by Dean and Shibley being identified as the list contained in Schedule A attached to the same agreement.

Dean and Shibley, as stated in their agreement, acted for a cor-

poration about to be organized, or then in process of organization, known as the Sand Filtration Company, now a party to this proceeding, and with the understanding and agreement of all parties that all the rights and obligations assumed by Dean and Shibley should be assumed by the said organization when organized, which was subsequently done.

The answer of the said corporation to the petition of Cowardin and others asserts that in the transfer of the plant to Dean and Shibley, as set forth in Schedule B to the agreement of August 25th, there was charged as the cost of mules the sum of $1190 which had already been charged in the cost or price of the wheel scrapers, set forth in the same schedule.

The books of account of May and Jekyll were called for by counsel representing the said Sand Filtration Company and were not produced for reasons appearing in the response of counsel to the call.

A ledger account kept and used by the Cowardin Company in the preparation and prosecution of the contract work on the
24 Filtration Plant, was produced and filed in connection with the testimony of the witness Price, who testified as an expert accountant. He states that he was employed by the Sand Filtration Corporation at the time of the transfer of the contract and plant to that company, and subsequently kept their books and accounts, which, however, are not produced here and perhaps are not material to this issue.

In the Cowardin Company ledger on page 2 I find what is entitled "Wheel Scraper Account" in which an entry appears under date April 18 of the purchase of 40 wheel scrapers from the Austin Manufacturing Company and another purchase of 13 wheel scrapers. On page 253 of that ledger I find the Austin Manufacturing account credited with the purchase of the first mentioned wheel scrapers and charged with three notes amounting to $1149. On page 5 I find a Bills Payable account which is credited by the amount of the three notes with which the Austin Manufacturing Company is charged. The Austin Manufacturing Company account is closed on the ledger by the payment of the balance in cash.

On page 6 of the ledger I find Mule Account, which shows the purchase of mules by the Cowardin Company to the amount of over $20,000 in addition to which $500 is charged for freight paid for transportation of the mules. A credit to this account shows a transfer to May and Jekyll of $9598.50 leaving a balance of debits unsettled. I will have occasion to refer to the form and entries of these accounts in a later part of this report.

The witness who testifies as an expert accountant states from recollection that in the books kept by May and Jekyll the three notes given to the Austin Manufacturing Company in payment for wheel scrapers were charged in a mule account, but on examination the witness is unable to state with any definiteness the form of the said entry in words or figures, and this testimony is the only proof tending to show that the amount of these notes was charged to the mule account, unless some additional proof be found either in the documents on file or the book entries which are in evidence. So far as the

books of the Cowardin Company shed any light upon the question it would seem that there was no confusion of the two accounts, mules and wheel scrapers, by reason of which through accident or mistake an item belonging to one should be charged or entered in the other, the accounts were in no respect related to each other nor had the notes in question any relation to the mule account.

The notes themselves were payable to a firm not dealing in live stock of any kind but known to contractors as extensive manufacturers of wheel scrapers and articles of like class. Again the sum of these notes alone does not account for the difference between the price affixed to the mules in the inventory of May and that of August by about $300.

Another fact from which presumption may be drawn is the difference between the aggregate of the plant inventory of May and that of August. The schedule of property transferred in May by the Cowardin Company to May and Jekyll aggregates $15,659.79 while the inventory of the property transferred to the Cowardin
25 Company and by that Company to Dean and Shibley aggregate $101,651.10 showing the acquirement by May and Jekyll during the three months of their operation of a very considerable quantity and variety of equipment and material necessary for and used in the prosecution of their work.

It is also significant in this connection that in the schedule of May the mules are described definitely as to number and kind while in the schedule of August the animals are described under the generic term of live stock and the price stated in the aggregate.

It is not unreasonable to assume that during the period of May and Jekyll's operation the live stock would be increased not alone in the class of mules but by other animals. At the time of the original transfer by the Cowardin Company to May and Jekyll the former had on hand a considerable number of mules in excess of those then transferred and I find in an account against May and Jekyll on the Cowardin Company's ledger before referred to, charges against that firm after the date of the transfer of over $2,000 in amount the items not definitely given.

It is somewhat remarkable that the witness referred to whose expert ability and service was pledged to the interests of his employers failed to bring the alleged error or over-charge to their attention when first discovered as he states. He testified to his very close connection with the inventories and transfers of August 25th. The books of both the Cowardin Company and May and Jekyll were for all needed purposes in his possession or subject to his examination at will. In and as a part of that transfer appear the difference in the price or cost affixed to the item of mules in the one and live stock in the other, both of which according to his testimony he understood to relate to mules. The notes in question had all matured and evidently had been paid by someone, either the Cowardin Company who were the makers or May and Jekyll whose liability was created by the agreement of May 26, so that the duplication or error or whatever it may be termed if existing at any time had been made before the 25th of August 1903.

There is one more condition to consider in this connection. There

is always a reasonable presumption that business men and corporations dealing with each other especially where the transactions are made with deliberation and reduced to documentary form with elaboration and detail are fully alive to their own interests and careful to examine the prominent items of detail which go to make up the agreement of transfer or other arrangement. So if the live stock entered in the agreement of August 25th was entered at excessive rates it would seem that the parties contracting for sale and purchase both being engaged in a business calculated to make them thoroughly conversant with the values of such property, it would be fair to presume that the alleged error would have been then and there discovered and corrected.

While it is possible that some of the apparent inconsistencies between the testimony and the obvious conditions appearing in the history of this case might have been explained, I am compelled to deal with the evidence as I find it and in view of the indefinite
26 character of the oral testimony submitted in support of the averment of overcharge and duplication, the presumptions afforded by acknowledged facts and conditions and the lapse of time since the alleged discovery of the error, I have to report as my finding that the alleged duplication in the schedule of the assets of the May and Jekyll Company turned over to the Cowardin Company and by them to the Sand Filtration Corporation is not sufficiently established in proof and that the alleged error of $1190 or $1149 was not made.

I am also directed to report on the expenses of the receivership. I return herewith the testimony of the receiver with a statement of his claim being made up of items of hotel and travelling expenses, telephone service, cost of bond and the expenses of a certain Mr. Hull in travel to Washington in relation to the bond, also an account of a firm of attorneys for legal services.

There are several objections to this claim as presented with the testimony of the receiver. The necessity for travelling and hotel expenses is not definitely shown to be chargeable to the receivership. On the contrary they appear to have been incurred in the interest and at the instance of the Sand Filtration Company in dealing with the departmental authorities at Washington. No dates appear in the claim filed nor are they definitely fixed by the testimony. The same objection applies to the expenses of telephone service.

As to the claim for reimbursement of cost of the bond, this is a claim which under the practice of the Court could not be allowed, but is to be covered by the compensation of the receiver and clearly the expenses paid to some agent or representative of the Bonding Company for travelling to Washington to arrange the bond could not in any view of the case be allowed.

As to the legal services for which a claim is made they are not shown to be at all connected with the duty or service of the receiver under his appointment.

These several expenses as appears from the testimony of the receiver have been paid by the Sand Filtration Corporation or by Dean and Shibley and I have to report upon the proof and the conditions appearing in the order of appointment and in the agreements

of the parties that the receiver is not entitled to reimbursement of the amount of these claims or either of them from the fund available in the cause or from the Cowardin Company.

JAS. G. PAYNE, *Auditor.*

Auditor's fee	$50.00
Cost of testimony	48.00
	$98.00

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STAGG
vs.
COWARDIN.

FRIDAY, *May* 11, 1906—10 a. m.

Hearing pursuant to notice.

Present: Mr. Tucker and Mr. Darlington.

Owing to the illness of Mr. Worthington, an adjournment was taken until Saturday, May 19, 1906, at 10:30 a. m.

* * * * * * *

STAGG
vs.
COWARDIN.

THURSDAY, *May* 31, 1906—11 a. m.

Hearing pursuant to notice.

Present: Messrs. Tucker and Huidekoper for May and Jekyll, Mr. Frailey for the Sand Filtration Corporation of America and Mr. J. J. Darlington for Cowardin Bradley Clay and Company also Mr. Stagg.

Mr. HARRY PRICE having been sworn testified as follows:

By Mr. FRAILEY:

Q. What is your residence?

A. Worcester, Massachusetts.

Q. What is your profession?

A. Manager for the Auditing Company of New York.

Q. What is the character of business done by the Auditing Company of New York?

A. Expert accounting.

Q. Do you know the Sand Filtration Corporation of America, were you ever employed by them in any way?

A. Yes.

Q. When were you employed by them.

A. At various times since their origin, January 1, 1904.

Q. Prior to the organization of the Sand Filtration Corporation were you employed by any of the parties interested in the Filtration plant in Washington?

A. I was employed by Dean and Shibley and arrived in Washington to take charge of the work at the Filtration plant August 29, 1903.

Q. What kind of work were you employed to do at the plant here?

A. To verify the inventories of material and supplies in the Filtration plant schedule which was handed me by Dean and Shibley and to open up a set of books and inaugurate a system of accounting for the continuance of the building of the filtration plant.

Q. Now, do you remember when the plant was turned over by Messrs. May and Jekyll to the Sand Filtration Corporation or rather to Dean and Shibley?

A. August 29, 1903.

Q. Well, do you remember whether it was May and Jekyll or Cowardin Bradley Clay and Company, that Messrs. Dean and Shibley got the plant — ?

A. No.

28 Q. It was?

A. I don't know from whom they got the plant, I——

Q. After Messrs. Dean and Shibley had the Filtration plant, and afterwards the Sand Filtration Corporation, did you have anything to do with the books or accounts of the Sand Filtration Corporation?

A. Yes, I have audited them regularly ever since they were opened, at irregular intervals.

Q. In that matter, did you at any time make any examination of the books of Cowardin Bradley Clay and Company and the books of May and Jekyll?

A. Immediately after taking the inventory as of August 29, 1903, I went to the books of Cowardin Bradley Clay Company and May and Jekyll and proved that inventory as to both quantity and values.

Q. What if any error or over-charge or anything of that kind with reference to mules, did you discover?

Mr. TUCKER: I object on the ground that the rights of Messrs. May and Jekyll are fixed by the contract of August 25, 1903 as between themselves and Messrs. Cowardin Bradley Clay and Company and no error in the method of bookkeeping on the part of either May and Jekyll or Cowardin Bradley Clay and Company can in any way affect the rights of May and Jekyll under such contract or properly require any deduction from the amount due them at this time namely $8,000, and, further on the ground that the books referred to are the best evidence upon the subject.

Mr. FRAILEY: I withdraw that question.

Q. Did you find any error in reference to mule accounts in your examination of these various books and verifying the inventory and schedule you have testified to?

Mr. TUCKER: I repeat my objection above stated.

Mr. DARLINGTON: On behalf of Cowardin Bradley Clay Company I reserve a similar objection to the proof, if the objection of May and Jekyll shall be held to be meritorious, and further that the

rights of Cowardin Bradley and Clay Company cannot be affected by a contemporaneous oral agreement.

The AUDITOR: The ruling is reserved.

A. Yes.

Q. I show you a book Mr. Price, and ask you in the first place where you got that book?

A. I first saw that book in the office of the Filtration plant when I took charge there.

Q. In Washington?

A. Yes.

Q. When you came down to that office in whose charge was that office at that time?

A. A bookkeeper employed by May and Jekyll.

It is stipulated that all questions propounded to this witness relating to the books of account of May and Jekyll and Cowardin Bradley Clay Company shall be admitted to be objected to on the ground heretofore stated without the necessity of repeating such objection.

Q. Among what books and papers was it found?

29 Mr. DARLINGTON: I object as calling for a simple conclusion of opinion of the witness as to the character of the papers among which the book was found.

The AUDITOR: The objection is sustained.

Q. You stated it was in the office of May and Jekyll?

A. Yes.

Q. In charge of one of their bookkeepers?

A. Yes.

Q. Have you any further knowledge as to what this book is?

A. I asked the bookkeeper what the book was.

Mr. TUCKER: I object.

Q. In this book which I show you at page 2 I turn to an entry under date May 22, 1903 and ask you in whose handwriting in your opinion is that entry?

Mr. TUCKER: I object.

Q. Is that entry in the hand-writing of the bookkeeper of May and Jekyll?

Mr. TUCKER: I object.

The AUDITOR: The objection sustained.

Q. State, if you know, the handwriting of the bookkeeper of May and Jekyll to whom you referred sometime ago?

A. I think I do.

Q. Have you ever seen him write?

A. Yes.

Q. Is that entry in his handwriting?

A. In my opinion it is.

Mr. DARLINGTON: I object to the entry of May and Jekyll's book-

keeper as being no evidence against Cowardin Bradley Clay Company.

Q. When did you first see this book that I have shown you?
A. Within two or three days of my first coming to the Washington Filtration plant.
Q. That you say was August 29, 1903?
A. Yes.
Q. Was this entry to which I have referred in the book at that time?
A. It was.

Mr. FRAILEY: I offer that entry in evidence.
Mr. DARLINGTON: I object as against Cowardin Bradley Clay Company.
Mr. TUCKER: I object on the ground heretofore stated and on the further ground that no agency has been shown between the alleged bookkeeper of May and Jekyll whose entry or declaration would in any wise bind May and Jekyll.
The AUDITOR: The ruling is reserved.

Q. You have stated I think that you examined the books of May and Jekyll?
A. Yes.

Mr. FRAILEY: I notified Mr. Tucker, if your Honor pleases, to produce here the books contained in this notice, the ledger and all the papers of May and Jekyll for 1903, I would like to ask if they have been produced here.

Mr. TUCKER: I have not produced them. Messrs May and
30 Jekyll are in Cuba and they informed me that their books are in storage in New York somewhere.

Mr. FRAILEY: I ask leave to introduce secondary evidence of their contents.

Q. In the books of May and Jekyll which you examined what if anything did you find with reference to the charge in the mule account which should or should not have been there?

Mr. DARLINGTON: I object on behalf of Cowardin Bradley Clay Company to questions concerning entries by the bookkeeper of May and Jekyll and to all further testimony on that subject.
The AUDITOR: The objection is sustained.

Q. What entires did you find, if you recollect with reference to a charge of $1149 under the head of mule account?

Mr. TUCKER: I object on the grounds heretofore stated and on the further ground that the book or books of May and Jekyll referred to are not in any way identified by the question.

A. I found a charge of $1149 in the mule account which I traced out and found to be three notes of $383 each in favor of the Austin Manufacturing Company, which notes were included in the charge which I have already testified to on page 2 of this ledger.

Q. Were those three notes included in the entry which has been offered in evidence?

A. Yes.

Q. What is this book in which this entry of May 22, 1903 appears, what does the book purport to be upon its face?

Mr. DARLINGTON: I object in so far as the book can prove itself.

The AUDITOR: The objection is sustained.

Q. You stated you examined this book in which this entry is found?

A. I did.

Q. I will ask you to look at page 5 and state whether any entries of notes appear on that page?

Mr. TUCKER: I object, if the entries are there, they are the best evidence, if they are admissable at all.

Q. Do you know in whose handwriting those entries on page 5 are?

A. No, I do not.

Q. Did you find in the book of May and Jekyll any entry in the sum of $720 being entries concerning wheel scrapers?

A. You have stated the amount wrong, if you will permit.

Q. Did you find any entry with reference to wheel scrapers which included $1149 which you have said was charged with reference to mules?

A. Yes.

Q. Explain that?

Mr. TUCKER: I object on the ground that the only admissible manner of examining this witness is to ascertain what the entries were on the books in question, leaving it to the Auditor to draw his conclusions from such entries.

Mr. FRAILEY: I offer this witness as an expert bookkeeper and accountant and claim the right to examine him as to not only
31 what his recollection is, but also as an expert to explain the entries which he may have found.

Q. What was the entry if you recall it?

A. I found an item of $1149 charged to wheel scrapers.

Q. On the books of May and Jekyll?

A. Yes.

Q. Was that item $1149 also charged to mule account in the same book?

A. Yes.

Q. How many times was that item, charge, made in the books of May and Jekyll?

A. Twice.

Q. How charged?

A. It was charged once in taking over the balances to May and Jekyll from this ledger which is in evidence, it was charged again when the notes which had been issued for this amount were paid.

Q. This item which has been offered in evidence May 22, 1903 is that one of the balances carried from May and Jekyll's books?

A. Yes.

Q. Does that include one of the charges of $1149 in the books of May and Jekyll to which you refer?

A. It does.

Q. Have you any personal knowledge as to these mules as to whether they were or were not a part of the filtration plant taken over by Dean and Shibley from Cowardin Bradley Clay Company?

A. I have.

Q. What is it?

A. I counted the mules.

Q. How many were there?

A. Fifty.

Q. As an expert bookkeeper, Mr. Price, when these notes that you speak of, of Austin Manufacturing Company, were paid, to what account should they have been charged?

A. When the notes were issued according to proper bookkeeping methods they should have been credited to an account called bills payable and the proper account charged, when they were paid the notes should have been charged to bills payable.

Q. To what account were they charged on the books of May and Jekyll when the notes were paid?

A. When the notes were paid, they were charged to mule account.

Q. Do you remember in what book of May and Jekyll was the account of those three notes?

A. Yes, they showed three notes separately on the three different days on which they were dated.

Q. What was the total of the three?

A. $1149.

Q. You have already told us that $1149 was the amount of these three notes as they were charged to mule account?

A. Yes.

Q. And that they were charged on the books twice?

A. Yes.

Q. To what account was the first charged?

A. Wheel scrapers.

Q. I will ask you whether the books showed that the item of $1149 charged twice as you said, were the proceeds of these three notes?

A. Yes.

By Mr. TUCKER:

Q. Mr. Price, when did you examine these books of May and Jekyll?

A. Within two or three days after my arrival in Washington on the 29th of August, 1903.

32 Q. Any expert examining these books would have detected this erroneous method of bookkeeping, would he not?

Mr. FRAILEY: I object.

The AUDITOR: The objection is overruled.

A. I should say that any expert should have discovered it.

Q. You have stated that you had personal knowledge of the number of mules received by Dean and Shibley from Cowardin Bradley Clay Company, did you similarly have personal knowledge of the

number of wheel scrapers received by Dean and Shibley from Cowardin, Bradley Clay Company?

A. Yes.

Q. How many were there?

A. I don't remember the number now, but I knew at the time, I counted them and tallied them with the inventory.

Q. By the inventory, do you mean this schedule which I hand you (indicating Schedule B attached to the agreement of August 25, 1903)?

A. Yes.

Q. That schedule shows the number of wheel scrapers to have been 53, was that the number received by Dean and Shibley from Cowardin, Bradley, Clay Company?

A. It was, if that is an exact copy of the paper which I handled.

Q. So that, as I understand you, 50 mules and 53 wheel scrapers were received by Dean and Shibley from Cowardin Bradley, Clay Company at or about the time you became acquainted with this matter?

A. Yes.

Q. What was the name of this bookkeeper of May and Jekyll that you have referred to in your direct examination?

A. I cannot remember his name.

Q. Can you repeat from memory exactly or substantially what the entry was in May and Jekyll's books relating to these wheel scrapers and mules?

A. Yes.

Q. Dictate then as nearly as you can, exactly what those entries were, in the form they are on the books themselves?

A. They appear as debit——

Q. I want the exact words.

A. No I won't attempt that.

Q. Then as I understand your testimony, it is as to the effect of these various charges on the books, you do not attempt to state in so many words and figures what the entries were?

A. I cannot state in figures what the entries were, I can state the effect on the whole, but I could not say just what the words of the entry was.

Q. Did those entries show or tend to show that 53 wheel scrapers and 50 mules were not received by Dean and Shibley from Cowardin, Bradley, Clay Company?

A. No.

Q. So far as the books were concerned they showed that that number of wheel scrapers and mules were actually received by Dean and Shibley?

A. Yes.

By Mr. DARLINGTON:

Q. Mr. Price, do you know in whose possession those mules were when you counted them?

A. They were in possession of employees of Dean and Shibley.

33 Q. You don't know how long they had been in their possession?

A. Yes, Dean and Shibley assumed charge the day I took the inventory.

Q. Have you any personal knowledge as to the party or parties from whom Dean and Shibley received these mules?

A. No.

Q. You don't know whether they did not get them directly from May and Jekyll.

A. No.

Q. This schedule B to which you have referred in your cross-examination appears to be a schedule included in the contract between Cowardin, Bradley, Clay Company and May and Jekyll, Dean and Shibley being no parties to it.

A. No, Dean and Shibley is mentioned in that first page.

Q. Do you know of any schedule made up of the articles as between Cowardin, Bradley, Clay Company and Dean and Shibley, or did you simply use Schedule B?

A. I simply used the schedule B which was handed to me by the representative of Dean and Shibley when I was employed.

Q. You stated you found Dean and Shibley mentioned in this contract between Cowardin, Bradley, Clay and Company and May and Jekyll, I will ask you to point out any reference to them?

Mr. FRAILEY: I object.

A. No.

The AUDITOR: The objection is overruled.

Q. What were the books of Cowardin, Bradley, Clay Company by which you were to verify the schedules at this time, shortly after August 29th?

A. The books were the ledger, and some minor subsidiary books which I found in the office at that time.

Q. Is the ledger about which you have been examined the one to which you refer?

A. Yes.

Q. How did you know they were Cowardin, Bradley, Clay Company's books?

A. I have no personal knowledge that they were Cowardin Bradley, Clay Company's books, but I asked the bookkeeper then in charge of the office what books they were and he told me that they were Cowardin, Bradley, Clay Company's books.

Q. You refer to the bookkeeper of May and Jekyll?

A. Yes.

Mr. DARLINGTON: I object to any declaration by May and Jekyll's bookkeeper as incompetent against Cowardin Bradley Clay Company.

Mr. FRAILEY: I submit the answer should stand as a direct answer to the question propounded.

Q. You have identified some entries in this ledger as being in the handwriting of May and Jekyll's bookkeeper?

A. Yes.

Q. Are you able to identify the handwriting of any other entry in the book?
A. Yes.
Q. Whose handwriting can you identify?
A. The handwriting of May and Jekyll's bookkeeper.
Q. Are those the only entries you can identify?
A. Yes.

34 By Mr. FRAILEY:

Q. You were asked by Mr. Darlington, if I am correct, whether you could identify any other entries in the book which you have said you were told was the ledger of Cowardin Bradley Clay Company, to which you replied you could identify other entries, turn to page 2 of this book which purports to be the ledger mentioned, you have identified an entry there as being on the handwriting of the bookkeeper of May and Jekyll, the entry dated May 22.
A. Yes.
Q. On that page how many other entries appear?

Mr. DARLINGTON: I object.
Mr. FRAILEY: I move to strike out the answer that he could identify other entries in the book as immaterial.
The AUDITOR: I deny that motion and allow the testimony to stand.

Q. This entry of May 22, 1902, in the handwriting of the bookkeeper of May and Jekyll in this ledger, does that item being $1972.92 appear in the books of May and Jekyll?
A. Yes.
Q. And does it appear on those books that the $1149 charge as you have described on their books is a part of this $1972.92?
A. It does.
Q. Under which entry does this $1972.92 appear on the books of May and Jekyll, under wheel scrapers or mule accounts?
A. This particular item appears under wheel scrapers.
Q. Do you remember approximately the date of these entries in the books of May and Jekyll as to whether the dates are before or after you went to the plant?
A. Oh, before I went to the plant.
Q. Dates prior to August, 1903?
A. Yes.
Q. Could you fix approximately on what dates those entries were made?
A. On May and Jekyll's books?
Q. Yes.
A. They appear at different times from May 22d, to August 29th.
Q. You can't recall the specific date of any specific entry?
A. No.

Mr. HENRY B. DEAN having been sworn testified as follows:

Q. Where do you live?
A. Providence.
Q. Rhode Island?
A. Yes.
Q. What is your occupation?
A. Banker and Broker, at the present time President of the Sand Filtration Corporation of America.
Q. Are you the Mr. Dean who figures in this proceeding as one of the partners of Dean and Shibley?
A. I am.
Q. The surviving partner?
A. Yes.
Q. You are the gentleman whom the Sand Filtration Corporation succeeded in the construction of the Filtration Plant here in Washington?
A. Yes.
Q. Did you have any dealings with Cowardin Bradley Clay Company personally?
A. I did.
Q. Tell us what occurred with reference to the transfer of the property enumerated in Schedule B which has been re-
35 ferred to?
A. That schedule was represented to be the cost price to Cowardin Bradley Clay Company of the property appearing on their books turned over to us.

Mr. DARLINGTON: I object to oral testimony upon this subject if the alleged representation was in writing, this should be produced.
Mr. TUCKER: I unite in this objection if it is intended that May and Jekyll made such representations.

Q. Mr. Dean who made these representations?
A. Mr. Cowardin and Mr. Bradley.
Q. Are they members of the firm of Cowardin Bradley Clay Company?
A. They were.
Q. When were these representations made?
A. At the time of the execution of the bill of sale and agreement.
Q. What bill of sale and agreement do you refer to?
A. Referred to in the general transfer of property and the contract.
Q. In other words you mean at the time Dean and Shibley took over the plant?
A. Yes.
Q. Where were they made?
A. In the office of Charles A. Douglass.
Q. In this City?
A. Yes.
Q. What did they say?
A. They said to us that these were the costs price to them of the plant as installed at that time of the contract.

Q. Was that said by them with reference to the items mentioned and enumerated in Schedule B?

A. Yes.

By Mr. DARLINGTON:

Q. You were aware were you not that the bulk of the articles enumerated in Schedule B had been purchased not by Cowardin, Bradley Clay Company, but by May and Jekyll?

A. I did not.

Q. You bought them on the same day that May and Jekyll executed the agreement transferring them to Cowardin Bradley Clay Company?

A. I did not know that.

Q. You were entirely innocent of any knowledge of May and Jekyll's connection with them?

A. I had some knowledge of their previous connection with it, yes.

Q. Cowardin, Bradley Clay Company did not tell you then that Schedule B represented the cost of the articles to May and Jekyll?

A. The cost to them, I understood.

Q. Have you any evidence that this representation was not entirely correct?

A. I have.

Q. Will you produce it.

A. By the books of Cowardin Bradley Clay Company.

By Mr. TUCKER:

Q. How many mules did you get from Cowardin Bradley Clay Company?

A. Fifty.

Q. How many wheel scrapers?

A. The list says fifty-three.

Q. Was that right?

A. So far as I know. I didn't count them, either the mules or the scrapers.

Q. Do I understand your claim here to be that you received
36 fewer mules and wheel scrapers than you were led to believe you would receive from the books of May and Jekyll or Cowardin Bradley Clay Company?

A. No, but we have paid more than we were told we should pay for the scrapers and mules, it is not that we received less, but that we paid more than we were told we should pay. Because we were told that the schedule represented the cost price and we have proven that we paid $1149 more than the cost price, it appearing to be an error in the entries, honest no doubt, but plainly an error on the part of the bookkeeper.

Q. You had no connection with May and Jekyll in this transaction?

A. None whatever.

Q. Do you know why the books of May and Jekyll were left at the office of the Sand Company, if they were so left?

A. Not to my knowledge.
Q. They were left there?
A. Not for any length of time.
Q. Mr. Price your expert claims to have examined them some four or five days after this contract of August 25?
A. No doubt, they remained there a week or ten days maybe longer.
Q. Do you know of any agreement, have you seen any papers purporting to be between May and Jekyll and Cowardin Bradley Clay Company executed by them which contains a schedule which is the exact duplicate of schedule B referred to?
A. I have not seen the original.

Adjourned.

In the Supreme Court of the District of Columbia.

In Equity. No. —.

THOMAS E. STAGG
v.
SAMUEL P. COWARDIN ET AL.

SATURDAY, *July 7th,* 1906—1 o'clock p. m.

Hearing pursuant to notice.
Present: Mr. Darlington on behalf of the Cowardin, Bradley, Clay Company; Mr. Frailey for Sand Filtration Corporation and Mr. Tucker for May and Jekyll.
Stipulation: It is stipulated and agreed between counsel for the respective parties that the Schedule B mentioned in the contract of August 25th, 1903, between Cowardin Bradley, Clay & Company, and May and Jekyll, and the Schedule A mentioned in the contract of the same date, between Cowardin, Bradley, Clay & Company and Dean and Shibley, are identical.
Mr. TUCKER: I offer in evidence the contract of August 25th, 1903, with attached contract of May 26th, 1903, both between Cowardin, Bradley, Clay & Company and May and Jekyll, together with the schedules therein referred to and thereto attached. Proof of the execution of the same is waived by counsel for Cowardin, Bradley, Clay & Company and the Sand Filtration Corporation,
37 and it is stipulated and agreed between counsel that a copy shall be filed and used as evidence in lieu of the original, subject to all objections and exceptions as to their irrelevancy and immateriality, the memorandum contained on the back of the contract just offered in evidence, not being included in the offer.
Mr. FRAILEY: I object to this contract as irrelevant, immaterial and incompetent.
(Said contract being as follows:)

Memorandum of Agreement made and entered into this 25 day of August, 1903, by and between Samuel P. Cowardin, James F. Bradley, Sydney P. Clay, Thomas E. Stagg of the City of Richmond, State of Virginia, co-partners, trading and doing business under the firm name and style of Cowardin, Bradley, Clay and Company, parties of the first part, and Robert H. May, George E. Jekyll, and Arthur B. Jekyll, of the City and State of New York, co-partners trading and doing business under the firm name and style of May & Jekyll, parties of the second part.

Whereas an agreement was made and entered into on the 26th day of May, 1903, by and between the parties hereto of the first part, and one Michael Kelly and the parties hereto of the second part, which said agreement or an accurate copy thereof is made a part hereof as if fully herein set forth, and

Whereas it is the desire of the parties thereto to cancel the same and discharge all and every of the obligations of either of the parties thereto.

Now therefore, this agreement witnesseth:

1. That said contract of May 26th, 1903, be and the same is hereby cancelled and all and every of the obligations of the parties thereto to each other are hereby finally discharged.

2. In consideration of the covenants of the parties hereto of the second part hereinafter set forth, the parties hereto of the first part covenant and agree to assume, and to procure the assumption thereof by any third party or parties who may hereafter undertake to complete the contract of the parties hereto of the first part with the United States, mentioned in said contract of May 26th, 1903 at the instance of request of the parties of the first part, all of the debts and liabilities of the parties hereto of the second part as shown on a schedule annexed hereto and made a part hereof and marked "Schedule A;" and the parties hereto of the first part further covenant and agree that they will contemporaneously with the execution and delivery of this agreement, execute and deliver to Charles A. Douglass and Edward B. Kimball as trustees, a deed transferring and assigning to said trustees all of the articles of personal property to be conveyed to the parties of the first part as provided for in the succeeding paragraph hereof; and included in the schedule mentioned therein and attached thereto as "Schedule B," in trust to hold the same as securtiy for the payment of said debts and liabilities of said parties of the second part as set forth in said Schedule "A";

and providing that such of said articles of personal property
38 as may be insurable, shall be kept insured, if possible and practicable to an amount equal to the amount of said debts, and further providing that upon the failure to pay and satisfy any of said debts, within twenty (20) days after demand of any of said creditors, said articles of personal property shall be sold by said Trustees at public sale upon such notice as they, in their discretion, shall deem necessary, and the proceeds of sale applied to the payment of said debts; the parties thereto of the second part not to be liable for any of the fees or commissions of said trustees, or the expenses of any sale made by them.

3. And in consideration of the assumption of their debts as aforesaid by the parties of the first part as above set forth, the parties of the second part hereby assign, transfer and make over to the parties hereto of the first part all of their right, title and interest in and to all contracts, privileges, franchises and easements heretofore acquired and now owned by them and pertaining to their construction plant upon the work hereinafter mentioned, and also all of their right, title and interest in and to all of the articles of personal property on the site of the filtration plant, a portion of which the parties of the first part are now under contract with the United States to construct and erect; and further covenant and agree to procure from the trustees Messrs. Darlington and Tucker, named in said contract of May 26th, 1903, an absolute bill of sale of that portion of said articles of personal property, the title to which is now vested in said trustees, to the parties of the first part, a schedule of all of which said articles of personal property is attached hereto and made a part hereof and marked "Schedule B."

4. The parties of the first part further covenant and agree to protect, indemnify and save harmless the parties of the second part from any loss or injury, damage, or liability that may result to them from the fact that Michael Kelly, one of the parties to the said contract of May 26th, 1903, is not a party to this instrument.

5. Inasmuch as the parties of the second part have heretofore advanced to the parties of the first part the sum of Ten thousand dollars ($10,000) under the eighth paragraph of said contract of May 26th, 1903, and there now remains due to the parties hereto of the second part Eight thousand dollars ($8,000) thereof, Two thousand dollars ($2,000) having been paid thereon, the parties of the first part hereby covenant and agree to repay the parties of the second part, or to their order, the said sum of Eight thousand dollars ($8,000) out of the net profits which may be realized by the parties of the first part from the construction or erection of that portion of said filtration plant which they have contracted with the United States to construct or erect. The said Eight thousand dollars ($8,000), if the same shall not sooner be voluntarily paid by the parties of the first part to the parties of the second part shall be reserved and paid out of the ten per cent. of the contract price for said work which will be reserved to the United States; and if the parties of the first part shall not themselves continue said work under their contract with the United States or shall procure some third party or parties to perform the same, or if the same shall be performed
39 by any person or persons on behalf of the parties hereto of the first part, appropriate provision shall be made for the reservation and payment of said Eight thousand dollars ($8,000) to the parties hereto of the second part; it being distinctly understood and hereby declared to be the purpose of this agreement that the repayment of the Eight thousand dollars ($8,000) shall be under the contingency that the parties of the first part shall realize a profit under said contract with the United States and not otherwise; and that if any profit shall be so realized by them, it shall be subjected to the payment of the said Eight thousand dollars ($8,000), or so much thereof as said profits will pay and satisfy.

In witness whereof the parties hereto have hereunto set their hands and affixed their seals on the day and in the year first above mentioned.

Executed in duplicate.

SAMUEL P. COWARDIN. [SEAL.]
JAMES F. BRADLEY. [SEAL.]
SIDNEY P. CLAY. [SEAL.]
THOMAS E. STAGG. [SEAL.]
ROBERT H. MAY. [SEAL.]
GEORGE E. JEKYLL. [SEAL.]
ARTHUR B. JEKYLL. [SEAL.]

Witnesses:
CHAS. COWLES TUCKER.
CHAS. A. DOUGLASS.

Memorandum of Agreement entered into this 26th day of May, 1903, by and between Samuel P. Cowardin, James F. Bradley, Sydney P. Clay, Thomas E. Stagg and Michael Kelly of the City of Richmond, State of Virginia, copartners, trading and doing business under the firm name and style of Cowardin, Bradley, Clay and Company, parties of the first part and Robert H. May, George E. Jekyll, and Arthur B. Jekyll of the City and State of New York, copartners, trading and doing business under the firm name and style of May & Jekyll, parties of the second part, witnesseth:

Whereas, the parties of the first part are the contractors *for* supply the labor and materials for the construction and completion of the filter plant for the City of Washington, District of Columbia, under and by virtue of a contract between the parties of the first part and Lieut. Colonel A. H. Miller, U. S. A., acting in behalf of the United States, dated the 6th day of April, 1903, which said contract is made a part hereof, as is herein set forth, the original of which, or an accurate copy thereof, is to be delivered to the parties of the second — upon execution and delivery of this agreement; and

Whereas, the parties of the first part now desire the parties of the second part to complete for them the said filter plant according to the said contract betwen them and the United States;

Now, therefore, this agreement witnesseth, that the parties of the first and second parts do mutually covenant and agree to and with each other as follows, to wit:

1. The parties of the second part covenant and agree to assume and pay the existing obligations of the parties of the first part and expenses incurred and paid by them, as set forth and described in Schedule A hereunto annexed and made a part hereof.

2. The parties of the first part hereby hire and employ the parties of the second part to provide all of the work, labor and material of every kind necessary to complete the said contract, together with a plant adequate to enable them to do so, and to go on and finish the said filtration plant in accordance, in all respects, with the terms, specifications, requirements and provisions of said contract of the parties of the first part with the United States in respect of said work; provided, said parties of the first part shall, in all respects, comply with the undertaking on their part in this agreement contained:

3. That for all work, labor and materials performed, supplied and furnished by the parties of the second part covered by the terms of the said contract of the parties of the first part with the United States as aforesaid, the said parties of the first part shall pay to the parties of the second part, out of the proceeds to be realized on said contract with the United States, a sum equal to ninety per centum of the contract price so received, in manner and form as follows, that is to say, the parties of the second part shall receive ninety per centum of the proceeds of every partial payment and the parties of the first part shall receive ten per centum of the same; and of the ten per centum of said contract price which under the contract with the United States is to be withheld until the completion of the same, the parties of the second part are to receive ninety per centum and the parties of the first part ten per centum; the parties of the first part reserving the right to receive from the United States the said proceeds in the manner hereinafter provided for, but as to the share of the proceeds due as aforesaid to the parties of the second part, the parties of the first part, in receiving the same in the manner hereinafter set forth, are to be deemed the agents for the parties of the second part, and upon the receipt thereof are to immediately pay the same over to them as hereinafter provided for; all drafts, warrants, or checks which shall be received from the United States to be received and endorsed over and the proceeds thereof applied in the manner hereinafter provided for:

4. The ten per centum of the contract price reserved to the parties of the first part hereunder shall apply only to the following work mentioned and described in or covered in and by paragraph one (1) of the contract with the United States (Form 19-*a*); that is to say, 880,000 cubic yards excavated; 65,400 cubic yards embankment under filters; 46,700 cubic yards other embankment; 123,400 cubic yards filling over filters; 3,000 cubic yards, puddle; 31 acres seeding; 9700 square yards, sodding; 39,300 cubic yards concrete in floors, 36,300 cubic yards, concrete in walls; 8,200 cubic yards, concrete in piers; 37,400 cubic yards, concrete in vaulting; 35,000 square yards, granolithic pavement; placing materials in masonry, complete, and drainage of roofs. If the above work shall be held by the United States to include the construction of 29 filters instead of 24, then the parties of the first part shall receive ten per centum upon the
41 price paid for 38 filters, but if it shall be held by the United States to include the construction of 24 filters instead of 29, then the parties of the first part shall be paid ten per centum upon the price paid for the 24 filters only. The parties of the first part shall pay to the parties of the second part all of the compensation which may become due from the United States for all work performed under said contract with the United States other than that mentioned and described in this paragraph, and for all work denominated as extra work in paragraph 391 of the Specifications attached to and made a part of said contract with the United States.

5. If necessary, or if it shall be required by the United States, the parties of the first part shall personally supervise the work, and during their absence the parties of the second part shall be, and shall

be deemed to be, their agents, and as such shall have full authority to act as the legal representatives of the parties of the first part in the matter of the performance of said work, with full power and authority to use the names of the parties of the first part in all dealings with the United States, and with all persons whatsoever, respecting said work, except that they shall have no power to contract any debts or liabilities in the name or upon the credit of the parties of the first part, and to receive and open all mail relating to said work addressed to said parties of the first part. The parties of the second part shall be subrogated to the rights of the parties of the first part in the matter of all claims against the United States growing out of said contract between the United States and the parties of the first part, and the parties of the second part shall be entitled to use the names of the parties of the first part in the prosecution of any such claim or claims. If, for any reason, the United States shall suspend the monthly or other payments on said contract, or, if by alterations ordered by the United States, the contract price for said work shall be in anywise diminished, the parties of the first part shall by reason thereof, have no claim against the parties of the second part.

6. In consideration of the foregoing, the parties of the second part covenant and agree that they will, in all respects, fully perform and complete the said contract of the said parties of the first part with the United States, according to said contract and in compliance with each and every of its terms, conditions and requirements.

7. As a guarantee that they will fully perform and complete the work required to be done, and furnish the materials required to be furnished under said contract with the United States, for the said filtration plant, and to indemnify the parties of the first part from all risk, loss and responsibility of any and every kind arising or to arise thereunder, whether to the United States or to the material men, mechanics, laborers, or otherwise, the parties of the second part hereby covenant and agree that they will pay over to Joseph J. Darlington and Charles Cowles Tucker the sum of Fifty thousand dollars ($50,000), of which Thirty-five thousand dollars ($35,000) shall be paid within forty-eight hours after the execution and delivery of this agreement, and the remaining Fifteen thousand dollars ($15,000) on or before the 15th day of June, 1903; the said
42 Fifty thousand dollars ($50,000) to be held and expended by them as trustees in manner and form following, that is to say: the said sum of money shall be deposited in the Riggs National Bank, in the City of Washington, District of Columbia, to the credit of said trustees, and the same shall be withdrawn only upon check jointly signed by said trustees. Said sum of money shall be expended in the purchase of a plant, which shall be purchased in the name of said trustees and used in the District of Columbia only, for the purpose of carrying out said contract with the United States. Said plant shall consist of the certain articles and implements already purchased and contracted for by the parties of the first part and set forth and described in Schedule B hereunto annexed and made a part hereof; and also all such additional implements and articles as may be selected by the parties of the second part. The property in said plant shall remain in the said trustees,

and the said plant shall not be removed from the District of Columbia until the said contract with the — shall be fully and satisfactorily performed and completed and all of the contract price distributed as hereinbefore provided for, or unless the parties hereto of the first part violate any of the terms of this contract; at which time and in which event, the said plant shall be turned over to the parties of the second part, or their assignees and shall thereafter remain their absolute property. The commissions of said trustees for their services shall be two per centum of the entire amount of said fund, and shall be paid by the parties of the first part. In event that work under this contract with the United States shall be stopped by the parties of the second part, in violation of this contract, then the said trustees shall turn over the said plant to the said parties of the first part who shall thereupon continue and complete the work under said contract with the United States, and upon the full completion thereof shall deduct from the contract price, or the balance thereof remaining due, ten per centum thereof, together with all actual damages, if any, suffered by the parties of the first part by reason of the stoppage of the work as aforesaid, and after the payment of all of such damages and also of the expenses of prosecuting said work to completion, any excess which shall remain shall be paid to the parties of the second part, and the said plant shall thereupon be turned over to them; provided, however, that said plant shall always be and remain charged with the payment of any actual damages suffered by the parties of the first part by reason of any such violation of this contract by the parties of the second part. In event that the United States shall prevent the parties of the second part, as the agents or employees of the parties of the first part, from performing or completing said contract with the United States; or in event that the parties of the first part shall be in default in anywise under this contract; or in event that the parties of the second part shall for any cause, other than their own misfeasance, nonfeasance or malfeasance, be prevented from carrying out and performing this contract, said plant shall be delivered to them by the said trustees free and discharged of any claim whatsoever on the part of the parties of the first part, or anyone
43 claiming under them. If the United States shall prevent the parties of the second part from commencing the work under said contract with the United States, without fault or default upon their part, or from continuing the work after the first instalment on the contract price shall become due, the $10,000 advanced hereunder to the parties of the first part shall be forthwith returned to the parties of the second part and, if unpaid, the latter shall have a lien therefor upon any and all checks, drafts or warrants hereafter issued by the United States to the parties of the first part under their contract with the United States.

8. The parties of the second part shall further advance to the parties of the first part, upon execution and delivery hereof, the sum of Ten thousand dollars ($10,000) which sum shall be repaid to the parties of the second part out of the share of the parties of the first part above reserved to them from the partial payments to be made by the United States as the work progresses: that is to say, out of

that portion of the partial payments remaining after paying to the parties of the second part ninety per centum thereof as aforesaid; provided, however, that said repayment or reimbursement shall be made out of the share of the parties of the first part of the first partial payment which shall become due and payable six months after the date hereof; and if the amount due the parties of the first part out of said last mentioned partial payment shall be insufficient to repay said $10,000 in full then from the share of the parties of the first part of the succeeding partial payment or payments thereafter until the said sum of $10,000 shall have been fully repaid to the parties of the second part.

9. The parties of the first part to secure the parties of the second part the payment of the sums that will become due to them from time to time on account of the performance and completion of the said contract with the United States and of their said advance of Ten thousand dollars ($10,000) as aforesaid, hereby give to the parties of the second part a lien upon any and all checks, drafts and warrants to be issued by the United States, and the proceeds thereof, in payment of the contract price of said filtration plant, and the instalments thereof; and the parties of the first part do hereby constitute and appoint the parties hereto of the second part agents and attorneys in fact of the parties of the second part, irrevocably, to receive from the United States each and every of said checks drafts or warrants: and do further covenant and agree that they, the parties of the first part, acting in that behalf by Samuel P. Cowardin, who is hereby constituted and appointed attorney in fact, irrevocably, for the parties of the first part so to do, or, in event of his death or disability, by James T. Bradley, who is hereby appointed as such attorney in fact, irrevocably, for the parties of the first part so to do, will sign all necessary vouchers and receipts and will endorse in the firm name of the parties of the first part, or in such manner and form as may be required by the accounting officers of the Government, and deliver to the parties of the second part, all drafts, warrants and checks that may be received on account of the said contract with the United States; and further, that they, the parties of the first part, will not ask, demand or receive any of the said
44 checks, drafts or warrants except in the presence of the parties of the second part, or one of them, or an agent or attorney appointed by them; and that whenever any of such checks, drafts or warrants are to be delivered the said Samuel P. Cowardin, or in event of his death or disability the said James F. Bradley on behalf of the parties of the first part will attend in person with the parties of the second part, or one of them, or their duly authorized agent or attorney, from time to time as may be necessary, upon the Government officer authorized to deliver said checks, drafts or warrants, upon being notified by the said parties of the second part so to do, and will then receive any such draft, warrant or check and will immediately endorse and deliver the same over to the parties of the second part, or their duly authorized agent or attorney, who shall thereupon and at once pay over to said Cowardin, or in event of his death or disability, to said Bradley, as agent and attorney for the parties

of the first part the share of the proceeds of any such draft, warrant or check due the parties of the first part as aforesaid; provided, however, that before endorsing any such warrant, check or draft, the parties of the first part shall be entitled to demand, and the parties of the second part shall thereupon furnish, satisfactory evidence to said Cowardin, or in event of his death or disability, to said Bradley, acting on behalf of said parties of the first part, that all material upon which the monthly estimates are based and for which such check, draft or warrant is issued, has been fully paid for. In event of the failure or refusal of the parties of the first part so to receive and endorse and deliver, or cause to be received, endorsed or delivered any such check, draft or warrant, it shall be competent for the parties of the second part to apply to any court of competent jurisdiction to have a receiver appointed to receive such check, draft or warrant; and the parties of the first part hereby consent to the appointment of such a receiver.

10. The parties of the first part further covenant and agree that they will not, as between themselves, apply to any court for the appointment of a receiver of their copartnership property or make any assignment of the proceeds of the said contract, or any instalment thereof, or any payment to be made thereupon, to any person other than the parties of the second part, and, further, that the provisions of this agreement, and each and every of them, may be specifically enforced in equity or by injunction or by mandamus, or other agreeable process as may be agreeable to law and to equity.

11. All permits from the owners and agents of land to dump excavated material thereon, and all permits and privileges of every kind whatsoever pertaining to said work to be done under said contract with the United States, held or owned by the parties of the first part are hereby assigned and transferred to the parties of the second part, and any and all such permits in writing are to be delivered to the parties of the second part, upon the execution and delivery hereof.

In testimony whereof, the parties hereto have hereunto set
45 their hands and affixed their seals, at the City of Washington, District of Columbia, on the day and year first hereinbefore written.

Executed in duplicate.

SAMUEL P. COWARDIN. [SEAL.]
JAMES F. BRADLEY. [SEAL.]
SIDNEY P. CLAY. [SEAL.]
THOMAS E. STAGG. [SEAL.]
MICHAEL KELLY. [SEAL.]
ROBERT H. MAY. [SEAL.]
GEORGE E. JEKYLL. [SEAL.]
ARTHUR B. JEKYLL, [SEAL.]
For GEORGE E. JEKYLL.

Witnesses:
MARIE C. BROWN.
CHAS. COWLES TUCKER.

SCHEDULE A.

Obligations Due and Expenses Incurred and Paid by Cowardin, Bradley, Clay & Co. for Other Than Plant.

Class 1.

Obligations Due and Expenses Incurred to be Assumed and Paid by May & Jekyll.

Wm. J. Holtman, feed	$691.41
R. P. Andrews, stationery	38.08
Merchants' Transfer & Storage Co. drayage	82.38
Knox Express Co. drayage	18.00
National Publishing Co. Printing	10.00
	$839.87

Class 2.

Expenses Heretofore Paid by Cowardin, Bradley, Clay & Co. to be Repaid Them by May & Jekyll.

Stable expenses	$270.12
Interest and discount	87.40
General expenses	786.80
Travelling expenses	387.14
Oil and grease	2.00
Blacksmith shop expenses	12.00
R. L. French, account of salary	10.00
Salary account	100.00
Excavating, labor work with scrapers	650.30
	$2,305.76

46 SCHEDULE B.

Plant Purchased and Contracted for by Cowardin, Bradley, Clay & Co.

Wheelscrapers	$1,872.92
Tools	169.97
Stable Buildings	301.60
Mules (50 at $191.97 each)	9,598.50
Harness	762.75
Wagon	35.00
Office fixtures	80.65
Blacksmith Shop tools	72.07
Track equipment (Railroad ties)	10.00
Freight on harness	13.20
W. R. Lipscomb, office building	830.00

S. D. Houck & Co. harness	9.75
J. C. Dickerson, harness	341.62
Rudolph, West & Co., tools, bar iron, roofing, etc.	104.72
J. B. Kendall, chain flatter & bar iron	11.68
Daly for water main, stable & concrete	313.62
Smith Courtney Co. plows and points	50.00
6 wagons	378.00
2 plows	48.00
6 points	32.00
Eisinger Bros. lumber	523.74
	$15,659.79

Due on account of above plant as follows:
Austin Mfg. Co. wheelscrapers, notes, as follows:

May 1, 1903, two months	$383		
May 1, 1903, 3 months	383		
May 1, 1903, 4 months	383		
		$1149.00	
Smith Courtney & Co. plows, open acct.		19.50	
Rudolph, West & Co. tools, building material, &c. open acct		125.55	
Peter Paul, mules, balance due		2000.00	
Samuel Evans, Gen. Mgr. G. & H. Mule Co.		1950.40	
Maxwell & Howard Mule Co. note dated May 7, 1903, payable 90 days		5914.49	
J. C. Dickerson, harness		484.75	
W. P. Lipscomb, office building		830.00	
S. P. Houck, harness		9.75	
J. C. Dickerson, harness		341.62	
Rudolph, West & Co. tools, iron bars, roofing, &c		104.72	
J. B. Kendall, chains, flatters & bar iron		11.68	
Daly, water main for stable, concrete		313.62	
47 Smith Courtney Co. plows		50.00	
6 wagons		378.00	
2 plows		48.00	
8 points		32.00	
Eisinger Bros. Lumber		523.74	
			14,286.82
Balance			1,373.07

NOTE.—The trustees in purchase of plant are to pay out of the funds in their hands, the above balance of $1373.07 to Cowardin, Bradley, Clay Co. and are to pay the above amounts aggregating $14,286.82, due on account of plant, making a total expenditure by trustees for plant of Cowardin, Bradley Clay & Co. $15,659.79.

SCHEDULE A.

Carter & Clarke (Ties)		$197.36
Somerville & Sons (Steam fittings)		162.09
C. F. Wilkins & Sons (Feed)		436.07
Rudolph, West & Co. (H'ware)		997.75
Smith Courtney (Materials)		230.92
Postal Telegraph		12.95
C. F. Muth (Engineering supplies)		3.27
W. C. Robinson Sons Co. (Oils)		97.52
Harwood Bros. (Oils)		26.29
Chesapeake & Pot. Tel. Co		10.00
G. W. Offutt (Explosives)		71.90
H. V. Rusk (Closet Boxes)		16.00
Geo. W. Knox Express Co		.65
Wm. L. King (Leather)		24.30
F. P. May & Co. (H'ware)		37.81
J. B. Kendall "		240.36
Standard Oil Co. (Oils)		173.13
Morrison Paper Co. (Stationery)		42.34
Home Rubber Co. (Rubber hose, etc.)		136.39
Eisinger Bros. (Lumber)		61.50
W. J. Holtman (Coal & Feed)		1063.23
Littlefield, Alvord & Co. (Drayage & Fr't. ad.)		940.52
Johnson & Wimsatt (Ties)		367.50
M. F. Talty Estate (Ties)		113.25
Bills Payable, Sept. 5th	$720.00	
8th, 25th	652.	
		1372.00
E. H. Gray (Founder)		3.20
Electric Refining Co. (Grease)		14.34
Thos. E. Stagg		466.54
W. B. Bradley Cons. Co. (Hoisting engine)		500.00
Austin Manufacturing Co		2741.20
Lingerwood Manufacturing Co		4860.00
Manzel Bros. (Lubricators)		112.50
48 McDonald & Onderdonk		5285.73
Jno. B. McDonald		381.00
Marion Steam Shovel Co. (Repairs, etc.)		30.32
Julian Scholl & Co. (Bushing)		15.50
Wallace Stebbins Sons		5812.67
J. Jacob Shannon Co		6008.50
Vulcan Iron Works Co		182.50
Woodward, Wight & Co. (Tank 36,500 Gal.)		433.00
Benj. Watson		46.55
G. L. Morrow		369.00
Heurich Brewing Co. (400 Gal. Tank)		16.00
Maury Dove Coal Co. (15 tons coal at $4.05)		60.75
		$34,176.10

SCHEDULE B.

186160 lbs. Steel Rail		3867.97
Six switches & 6 frogs		360.37
5 Manhattan elevated R. R. locomotives		11728.00
820 cross ties		390.50
Wheelbarrows (2)		4.90
32 dump wagons, 1 sprinkler, 1 mountain wagon		3353.90
53 wheel scrapers		1533.35
40 dump cars		6191.00
Two steam shovels		15650.03
One steam roller		3574.00
Freight traction engine		38.68
One grader		1089.96
Harness		1071.30
162 whiffletrees		92.92
72 R. R. shovels		52.76
16 R. R. picks		8.00
20 mattocks		10.96
One trade jack		13.00
Plows, two, 5 shares		77.25
20 axes		17.00
4 blocks		9.30
Six crow bars, 1 claw bar		10.53
Wrenches—5 Stillson, 5 Coe's		13.17
9 Taps		5.68
4162 feet iron pipe		528.24
3 sets stock and dies		28.70
1 vice		4.50
1 pair pipe cutters		1.57
10 drill bits		5.90
19 sledges and hammers		14.72
6 pairs tongs and pincers		8.85
One anvil		15.50
Two bellows & blowers		44.00
	25 feet chain	4.90
49	3 cross cut saws	7.35
	4 pitch forks	2.00
6 lanterns		2.88
150 feet rubber hose		27.00
2 doz. padlocks		4.00
18 Galv. iron pales		3.88
Cableway and tower		5222.82
12 cans and funnels		4.50
1 platform scale		29.00
Two car replacers		29.00
One derrick		64.31
Sundry carpenter and blacksmith's tools		68.35
Live stock (50 mules)		11042.46
Cement house		1376.37
Buildings, various labor and materials		2284.12
Railroads		1956.67

Sundries from Cowardin, Bradley, Clay & Co.	2244.52
26 steel sheets for washing plant	196.93
30 dump cars	4350.00
1 traction engine	1585.00
Rock crusher (complete)	2741.20
Cableway, balance to pay	5764.90
Automatic feed pumps, three	112.50
One steam shovel	5000.00
Worthington pump, engine, boiler, 25 H. P.	381.00
B. S. Disphrang Pump complete	46.86
One 80 H. P. Portable bailer	825.00
One 13″ by 16″ trottling machine	523.00
Six timber dollies	24.00
500 — Swedish iron cable, 2 thimbles, 6 clips	29.35
Two portable boilers & engines, 1 40 H. P., 1 25 H. P.	1898.00
3300 lbs. rails	49.50
28 pair car wheels & trucks	1293.60
Water tank, 36,500 gals.	433.00
Wells lights (two)	178.00
R. R. Spikes	55.00
Track bolts	40.44
Wire nails	25.05
2000 feet 4″ iron pipe	250.00
2044 cross ties	678.11
Hoisting engine and boiler	500.00
One 400 gal. water tank	16.00
2 sets grates for steam shovel	73.50
	$101,651.10

50 EXHIBIT A.

Accompanying Testimony Taken Before Auditor.

John D. Maclennan, Receiver of Cowardin, Bradley, Clay & Co.

12 Broadway, New York, N. Y.

MAY 21, 1906.

Cowardin, Bradley, Clay & Company, to John D. Maclennan, Receiver, Debtor.

3 weeks' hotel expenses in Washington, D. C., 21 days @ $7.50	$157.50
Travelling expenses, 4 round trips New York to Washington, D. C.	80.00
Long Distance telephone service	24.50
Telegrams and postage	3.25
Expenses Mr. Hull, Fidelity & Deposit Co. of Maryland, to Washington and return	11.30
J. M. Swormstedt, General Agent, premium on bond, Receiver, two and a half years	312.50
Bill of Lawrence & Hughes, legal services	100.00
	$689.05

Exceptions to Auditor's Report.

Filed August 24, 1906.

In the Supreme Court of the District of Columbia.

No. 24167. Equity.

THOMAS E. STAGG, Complainant,
vs.
SAMUEL P. COWARDIN ET AL., Defendants.

Now comes the defendant, The Sand Filtration Corporation of America, by Charles L. Frailey, its solicitor, and files exceptions to the report of the Auditor, filed in the above entitled cause on the 2nd day of August, 1906, as follows:

1st. To so much of said report as finds that the alleged duplication in the schedule of assets of the May and Jekyll Company is not sufficiently established by proof, and that the alleged error of $1190.00 or $1149.00 was not made.

2nd. To that part of the report which disallows reimbursement of the cost of bond.

3rd. To that part of said report which finds that the legal
51 services are not shown to have been connected with the duty or service of the receiver under his appointment.

4th. To the disallowance of said claim for legal services.

5th. To the disallowance of the several items of expenses incurred by the Receiver as a whole.

6th. To the disallowance severally of each of the items above mentioned.

Aug. 24, 1906.

THE SAND FILTRATION CORPORATION OF AMERICA,
By CHARLES L. FRAILEY,
Solicitor for The Sand Filtration Corporation of America.

Order Overruling Exceptions to Auditor's Report, &c.

Filed October 10, 1906.

In the Supreme Court of the District of Columbia.

In Equity. No. 24167.

THOMAS E. STAGG, Complainant,
v.
SMAUEL P. COWARDIN ET AL., Def'ts.

This cause coming on to be heard upon the Exceptions of the Sand Filtration Company of America, to the report of the Auditor filed

in this cause, August 2, 1906, and having been argued and submitted by the solicitors for the respective parties, it is by the Court this 8th day of October, 1906, adjudged, ordered and decreed that said exceptions be and the same are hereby overruled; and further that the Receiver herein be, and he hereby is, directed to pay forthwith out of the moneys in his hand, the sum of eight thousand dollars ($8,000) to the solicitors of record for May and Jekyll, and two thousand dollars ($2,000) to the solicitor of record for Cowardin, Bradley, Clay & Company; and that said May & Jekyll and Cowardin, Bradley, Clay & Company recover their costs in this matter incurred from said Sand Filtration Company of America, said costs to be taxed by the Clerk of this Court.

And from this decree the said Sand Filtration Company of America appeals to the Court of Appeals of the District of Columbia and the penalty of the appeal bond, to operate as a supersedeas, is fixed at Ten thousand dollars.

HARRY M. CLABAUGH,
Chief Justice.

Memoranda.

October 29, 1906.—Appeal bond—filed.

November 16, 1906.—Time to file record in Court of Appeals extended to December 15, 1906.

52 *Designation of Record on Appeal.*

Filed November 28, 1906.

In the Supreme Court of the District of Columbia.

Equity. 24167.

THOMAS E. STAGG
v.
SAMUEL P. COWARDIN ET AL.

Counsel for the Sand Filtration Corporation of America, appellant from the decree of court rendered herein on the 10th day of October, 1906, hereby designates the following portions of the record in the above entitled cause to constitute a transcript of the record on appeal:

1. Petition of Cowardin, Bradley, Clay & Company for rule on receiver to show cause, filed March 6th, 1906.
2. Answer thereto of receiver.
3. Answer thereto of May & Jekyll.
4. Answer thereto of the Sand Filtration Corporation of America.
5. Rule to show cause issued on said petition.
6. Contract between Dean and Cowardin, Bradley, Clay & Company, dated August 25th, 1903 and being exhibit "B" of stipulation with exhibits filed April 2nd, 1906.

7. Supplemental agreement between Dean and Cowardin, Bradley, Clay & Company, dated August 27th, 1906 and being exhibit "C" of stipulation with the exhibits filed April 2nd, 1906.

8. Contract between Maclennan receiver, and Dean, dated August 27th, 1903, being exhibit "B" of receiver's report filed February 8th, 1904.

9. Decree of Court dated April 3rd, 1906, made after hearing upon the rule to show cause and referring the case to the Auditor.

10. Testimony taken before the Auditor with the exception of the testimony of J. D. McClenman receiver.

11. Exhibits to the testimony taken before the Auditor.

12. Auditor's report.

13. Exceptions to Auditor's report.

14. Decree of court overruling the exceptions to Auditor's report and confirming the same etc., dated October 10th, 1906.

15. Memorandum of filing of appeal bond.

16. Proceedings on appeal.

CHARLES L. FRAILEY,
Of Counsel.

By SINCLAIR,
Counsel for Sand Filtration Corporation of America.

53 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 100, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript in cause No. 24167, Equity, wherein Thomas E. Stagg is complainant and Samuel P. Cowardin, *et al.*, are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 13th day of December, A. D. 1906.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 1746. The Sand Filtration Corporation of America, Appellant, *vs.* Samuel P. Cowardin *et al.* Court of Appeals, District of Columbia. Filed Dec. 13, 1906. Henry W. Hodges, Clerk.

54 WEDNESDAY, *April 10th, A. D.* 1907.

No. 1746.

THE SAND FILTRATION CORPORATION OF AMERICA, Appellant,
vs.
SAMUEL P. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY and THOMAS E. STAGG, and ROBERT H. MAY, GEORGE E. JEKYLL, and ARTHUR B. JEKYLL.

The argument in the above entitled cause was commenced by Mr. C. L. Frailey, attorney for the appellant, and was continued by Messrs. C. C. Tucker and J. J. Darlington, attorneys for the appellees.

THURSDAY, *April 11th, A. D.* 1907.

THE SAND FILTRATION CORPORATION OF AMERICA, Appellant,
vs.
SAMUEL P. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY and THOMAS E. STAGG, and ROBERT H. MAY, GEORGE E. JEKYLL, and ARTHUR B. JEKYLL.

The argument in the above entitled cause was concluded by Mr. C. L. Frailey, attorney for the appellant.

On motion both sides are allowed to file additional briefs herein if so advised.

55 No. 1746.

THE SAND FILTRATION CORPORATION OF AMERICA, Appellant,
v.
SAMUEL T. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY and THOMAS E. STAGG, and ROBERT H. MAY, GEORGE E. JEKYLL, and ARTHUR B. JEKYLL.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the Court:)

This is an appeal from a decree directing distribution of a fund in the hands of a receiver.

The necessary facts involved are these:

Cowardin, Bradley, Clay and Stagg, hereafter called the Cowardin Co., were the successful bidders for the construction of the filtration works for the District of Columbia, and on April 6, 1903, entered into a contract with the United States therefor. The Cowardin Co. purchased and contracted for certain building materials, implements and mules for the commencement of the work, at an aggregate cost of $15,659.70. On May 3, 1903, the Cowardin Co. entered into a contract with May and Jekyll for the performance of their contract. May and Jekyll agreed therein to complete the work required by the contract for ninety per cent. of the contract price, the remaining ten

per cent. to be the profit of the Cowardin Co. They also agreed to reimburse the Cowardin Co. for their expenditures aforesaid, to assume responsibility for all supplies already contracted for, to lend them $10,000 in cash, and to place $50,000 in the hands of two trustees to be expended in the purchase of further supplies for the construction work; the trustees holding title thereto as a guaranty that May and Jekyll would perform the contract.

May and Jekyll desired to abandon the performance of the contract, on or before August 25, 1903, and one Dean, who afterwards took out the charter of the Sand Filtration Corporation of
56 America, desired to undertake the further execution of the original contract. A new agreement was entered into between the Cowardin Co. and May and Jekyll on August 25, 1903, in which it was agreed that the former contract be cancelled, and in consideration May and Jekyll sold and delivered to the Cowardin Co. all of the supplies, implements, personal property and so forth, including not only that purchased from the Cowardin Co. under the contract of May 25, 1903, but also all that had been purchased by the trustees with the $50,000 as provided in said contract. The Cowardin Co. also agreeing to assume and to procure the assumption by any parties undertaking the work, of certain liabilities of May and Jekyll as contained in exhibit A thereto attached; and they agreed further to convey all of the property on hand as per schedule B to trustees to secure the payment of the aforesaid liabilities in schedule A. The last clause of said contract reads as follows:

"5. Inasmuch as the parties of the second part have heretofore advanced to the parties of the first part the sum of Ten thousand dollars ($10,000) under the eighth paragraph of said contract of May 26th, 1903, and there now remains due to the parties hereto of the second part Eight thousand dollars ($8,000) thereof, Two thousand dollars having been paid thereon, the parties of the first part hereby covenant and agree to repay the parties of the second part, or to their order, the said sum of Eight thousand dollars ($8,000) out of the net profits which may be realized by the parties of the first part from the construction or erection of that portion of said filtration plant which they have contracted with the United States to construct or erect. The said Eight thousand dollars ($8,000), if the same shall not sooner be voluntarily paid by the parties of the first part to the parties of the second part shall be reserved and paid out of the ten per cent. of the contract price for said work which will be reserved to the United States; and if the parties of the first part shall not themselves continue said work under their contract with the United States or shall procure some third party or parties to
57 perform the same, or if the same shall be performed by any person or persons on behalf of the parties hereto of the first part, appropriate provision shall be made for the reservation and payment of said Eight thousand — ($8,000) to the parties hereto of the second part; it being distinctly understood and hereby declared to be the purpose of this agreement that the repayment of the Eight thousand dollars ($8,000) shall be under the contingency that the parties of the first part shall realize a profit under said contract with

the United States, and not otherwise; and that if any profit shall be so realized by them, it shall be subjected to the payment of the said Eight thousand dollars ($8,000), or so much thereof as said profits will pay and satisfy."

(Cowardin Co. are the parties of the first part, and May and Jekyll of the second).

On the same day Cowardin Co. and Henry B. Dean, trading under name of Dean and Shibley, entered into an agreement for the completion of the contract. This instrument recited the contract of the Cowardin Co. with the Government for the construction of the filtration plant; the construction plant as set forth in schedule B. aforesaid, as then in hands of Cowardin Co.; that the Cowardin Co. is financially unable to proceed with the work, and it is in condition warranting the appointment of a receiver; the contract with May and Jekyll of August 25, 1903, cancelling the former contract between them and the Cowardin Co., and the agreement of Dean to assume the obligations of the Cowardin Co. thereunder; and that Dean and Shibley were then organizing the Filtration Corporation which would undertake the completion of the contract under an arrangement to be made with the receiver when appointed. In consideration of the promises of Dean, the Cowardin Co. conveyed to him all of the articles of construction plant specified in the exhibits, together with all that had been acquired from May and Jekyll and the trustees aforesaid. This was subject to the following conditions: First,
58 that one John D. Maclennon of Cleveland Ohio, shall be appointed receiver of the Cowardin Co., by a court of competent jurisdiction, which shall authorize the prosecution of the work under this contract, and the employment therein of the Sand Filtration Corporation; Second, that a contract shall be made between said receiver and the Sand Filtration Corporation by which the latter shall be employed to complete the contract with the United States, and shall receive all payments under said contract save such as shall be required to pay the costs and expenses of said receivership. The Sand Filtration Corporation shall execute a bond for $150,000 conditioned for the complete performance of the contract with the Government, and the payment of all claims for labor and material. That upon the execution of said contract and bond the title to the construction plant aforesaid shall pass to and be vested in said Sand Filtration Corporation.

The fourth clause of this contract reads as follows:

"Fourth. As consideration for the construction plant by this instrument acquired by the grantee, or the Sand Filtration Company of America, the grantee until the said Sand Filtration Company of America has been organized and substituted and thereafter the said last named company, assume and agree to pay all the debts of May and Jekyll specified in Schedule B hereto attached and a part hereof, when and as they or it may arrange with the several creditors, and in general to comply with the provisions and conditions of one certain agreement entered into between the grantors and said May and Jekyll, a copy of which is hereto attached and to be read as a part hereof, including among other provisions the payment of the sum of

$8,000 to the said May and Jekyll as in said agreement is provided, and the payment of which is also assumed by the said grantee; and also to pay to the receiver the sum of $65,000, to be distributed thereafter as the court may direct, which said sum of $65,000 shall become due and payable as follows: the sum of $10,000 on September 15th, 1903, $15,000 on January 15th, 1904, $10,000 on March 15th, 1904, $10,000 on May 15th, 1904, and the remaining $20,-
59 000 on the completion of the said filtration plant and at the time of the final payment thereon by the United States; and the said grantee, and the Sand Filtration Company of America, when said company shall have been substituted for the said grantee, shall also pay to the grantors or their attorney for them the sum of $3,517.50—said sum having been paid by the grantors on account of pay roll and other expenses since the commencement of negotiation between the parties hereto, and further to pay all other expenses and obligations necessary to be incurred between the date of this contract and the execution of the formal contract with the receiver hereafter to be appointed for the grantors.

"It is further agreed that all expenses, costs and fees of receivership and of the cause in which the receiver is appointed are to be borne by the grantors, or to be defrayed by the receiver out of the funds which may come into his hands for them."

The provisions in regard to the receiver and the contract with him were necessary to the protection of the Filtration Corporation, because there could be no direct assignment of a government contract. It appears that all of the foregoing conditions were performed, and the property delivered to the Filtration Corporation which completed the work required by the contract.

On said 25th day of August, 1903, a supplemental agreement was signed by the Cowardin Co. authorizing the receiver to deduct from the money received from the Government the said sums of $65,000 and $8,000, and pay the same directly to the said Cowardin Co., instead of first paying the same to the Filtration Co., and receiving the same back from it.

The proceeding leading up to the decree appealed from was begun by a petition filed by the Cowardin Co. on March 13, 1906, for a rule to the receiver. This petition recited the facts of the case generally, and alleged that of the last payment made by the Government to the receiver, on the completion of the contract, there remained in the hands of the receiver the sum of $18,000, which he with-
60 held at the demand of the Sand Filtration Co., and an order for its payment was prayed. The several parties in interest answered the petition. The Sand Filtration Corporation claimed that the sum of $1190 should be retained from the money due Cowardin Co. because of a mistake of that amount in the schedule of property delivered, which they called a "duplication of assets." It denied liability for the $8,000 to May and Jekyll because no profits had been realized from the contract; and that the contract had been completed by the Filtration Co. at a loss of $100,000.

An interlocutory order was passed April 3, 1906, requiring the receiver to pay over to the Cowardin Co. $8,000, out of the $10,000

fund, reserving the sum of $2,000 until the coming in of the Auditor's report. And the Court being further of the opinion that the Cowardin Co. had made a profit under their contract with the Government, within the intent and meaning of the contract between them and May and Jekyll, but being unable to determine from the then state of the record whether there was an error of $1190 arising from a duplication in the schedule of the assets of May and Jekyll turned over by them to the Cowardin Co., and by the latter to the Sand Filtration Corporation, the matter of that determination was referred to the Auditor with power to take testimony, etc.

Testimony having been taken before the Auditor, the latter reported at length denying the claim of the duplication of said assets.

The Sand Filtration Corporation excepted to the Auditor's report. These exceptions were overruled and the report confirmed on October 8, 1906; and a final decree was passed directing the receiver to pay to May and Jekyll the sum of $8,000, and to the Cowardin Co. the said sum of $2,000 reserved by the order of reference to the Auditor. The Sand Filtration Corporation has appealed from the final decree.

The Auditor's report contains a careful review of the testimony produced before him, relating to the alleged duplication of
61 assets in the transfer of construction plant and material from the Cowardin Co. and May and Jekyll to the Sand Filtration Corporation, and a well reasoned conclusion against the contention of the latter.

It appears that schedules were carefully prepared, and referred to in the several contracts, showing each item of construction plant and material that was finally delivered to the Sand Filtration Corporation; and that the same were verified by the latter's financial expert. The books and accounts of all parties were open to inspection, and the mistake, if it occurred, passed unnoticed. No question in respect of it seems to have been raised until nearly three years thereafter, when the time for final settlement arrived. Under these conditions the Filtration Corporation assumed a heavy burden in attempting to show that a mistake had been made in some one of the items of the schedules. Without adding anything to the Auditor's discussion of the evidence, we agree with him that the showing made was insufficient, and with the Court in confirming his report.

As regards the $8,000 payment ordered to be made to May and Jeykll, the contention is, first, that the obligation of the contract of the appellant with the Cowardin Co. was to pay said sum in the event only that the appellant should make a profit in carrying out the contract. In this connection, it is conceded that the appellant instead of making a profit, actually sustained a loss considerably greater than that amount.

The second contention, in case of the denial of the first, is, that no profit was made in the transaction by the Cowardin Co. The contract by the Cowardin Co., which the appellants assumed, with Jekyll and May, was to pay them the $8,000 out of the net profits which the Cowardin Co. might realize from the construction of that portion of the filtration works which they had contracted for with the United

States. In contemplation of that contract, the Filtration Corporation, on the same day, assumed the performance of the contract of the Cowardin Co., and in consideration thereof and of the
62 construction plant derived from May and Jekyll through the Cowardin Co., agreed to pay the said sum of $8,000 to May and Jekyll as well as the sum of $65,000 for the said plant which was then and there received. There was no condition in this contract making that payment dependent upon the making of a profit by the Filtration Co. in the transaction; nor is there any language used from which such a condition can be inferred. The fact that the Filtration Co. undertook the completion of the contract at all, indicates its certain expectation of profit in the transaction, and if it feared that the expected profit would not exceed the $8,000 payment assumed, it was its duty to protect itself in that particular by some express stipulation to that effect. Having failed to so provide, May and Jekyll, who furnished a consideration for the undertaking and have also sustained a substantial loss, cannot be made to bear the consequences of the failure of those expectations.

The Court was right also in holding that the Cowardin Co. derived net profits of more than $8,000 from their contract with the Government. May and Jekyll not only repaid them every dollar of their original outlay—$15,000, in round numbers—but also turned over to them $50,000 worth of additional construction plant and material that had been purchased by them. In the new contract with the Filtration Corporation, the latter assumed the complete performance of the Government contract for the money payable thereunder, and made performance secure by the exacted bond in the sum of $150,000. The Filtration Corporation, in order to secure this contract, took over the plant which had been relinquished by May and Jekyll to the Cowardin Co. at the agreed price of $65,000, payments of which in installments were required to be deducted from the Government's payments by the receiver and paid to the Cowardin Co. Notwithstanding the losses of May and Jekyll on the one hand, and the Filtration Corporation on the other, the Cowardin Co. realized a net profit of say $65000. Without
63 one dollar of actual expenditure in the performance of their contract with the Government, so far as the record shows, they secured its performance by others, and received the sum of $65,000 for the plant mainly derived from May and Jekyll who gave it up in order to be released from their first contract.

Had the Cowardin Co. not contracted the plant to the Filtration Corporation, but, after securing the final performance of the Government contract by the latter, had sold the plant to others, the amount received therefor would have been a net gain. Its character as gain or net profit was not changed by selling the plant to the Filtration Corporation. Having made this net profit, the liability of the Cowardin Co., assumed by the Filtration Corporation, became fixed and enforceable.

The Court rendered the proper decree under the facts presented by the record, and it will, therefore, be affirmed with costs. It is so ordered.

Affirmed.

64 TUESDAY, *May 7th, A. D.* 1907.

No. 1746, April Term, 1907.

THE SAND FILTRATION CORPORATION OF AMERICA, Appellant,
vs.
SAMUEL P. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY and THOMAS E. STAGG, and ROBERT H. MAY, GEORGE E. JEKYLL, and ARTHUR B. JEKYLL.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.
May 7, 1907.

TUESDAY *May 21st*, A. D. 1907.

No. 1746.

THE SAND FILTRATION CORPORATION OF AMERICA, Appellant,
vs.
SAMUEL P. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY and THOMAS E. STAGG, and ROBERT H. MAY, GEORGE E. JEKYLL, and ARTHUR B. JEKYLL.

On motion of Mr. C. L. Frailey, of counsel for the appellant in the above entitled cause, It is ordered by the Court that said appellant be allowed an appeal to the Supreme Court of the United States,
and the bond to act as supersedeas is fixed at the sum of
65 fifteen thousand dollars, and the bond for costs at the sum
of three hundred dollars; and it is further ordered that the mandate in said cause be stayed until further order.

66 (*Bond on Appeal.*)

Know all Men by these Presents, That we, The Sand Filtration Corporation of America, as principal, and the National Surety Company, a corporation organized and existing under the laws of the State of New York, and having an office and principal place of Business at 115 Broadway, as surety, are held and firmly bound unto Samuel P. Cowardin, James F. Bradley, Sydney P. Clay and Thomas E. Stagg, and Robert H. May, George E. Jekyll, and Arthur B. Jekyll in the full and just sum of Fifteen thousand ($15,000.00) dollars, to be paid to the said Samuel P. Cowardin, James F. Bradley,

Sydney P. Clay and Thomas E. Stagg, and Robert H. May, George E. Jekyll and Arthur B. Jekyll, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of May, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between The Sand Filtration Corporation of America, appellant, and Samuel P. Cowardin and others appellees, and numbered 1746 on the general docket of said Court of Appeals, a decree was rendered against the said The Sand Filtration Corporation of America and the said The Sand Filtration Corporation of America having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Samuel P. Cowardin, James F. Bradley, Sydney P. Clay and Thomas E. Stagg and Robert H. May, George E. Jekyll and Arthur B. Jekyll citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said the Sand Filtration Corporation of America shall prosecute said appeal to effect, and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE SAND FILTRATION CORPORATION
OF AMERICA.
HENRY B. DEAN, *President.* [SEAL.]

[Seal of The Sand Filtration Corporation.]

NATIONAL SURETY COMPANY,
By WILLIAM J. GRIFFIN, *Vice Pres.* [SEAL.]

[Seal of National Surety Company.]

Attest:
E. CASHION,
Res. Ass't Sec.

Sealed and delivered in presence of—
HENRY J. O'BRIEN,
Secretary Pro Tem.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1746. The Sand Filtration Corporation of America, appellant, *vs.* Samuel P. Cowardin *et al.* Supersedeas Bond on appeal to Supreme Court, U. S. Court of Appeals, District of Columbia. Filed June 10, 1907. Henry W. Hodges, Clerk.

67 UNITED STATES OF AMERICA, *ss:*

To Samuel P. Cowardin, James F. Bradley, Sydney P. Clay and Thomas E. Stagg, and Robert H. May, George E. Jekyll and Arthur B. Jekyll, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The Sand Filtration Corporation of America is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 10th day of June, in the year of our Lord one thousand nine hundred and seven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.
J. J. DARLINGTON,
Att'y for Cowardin, Bradley, Clay & Stagg.
TUCKER AND KENYON,
REGINALD S. HUIDEKOPER,
Att'ys for May & Jekyll.
June 11, 1907.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun- 11, 1907. Henry W. Hodges, Clerk.

68 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 67 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Sand Filtration Corporation of America, Appellant, *vs.* Samuel P. Cowardin, James F. Bradley, Sidney P. Clay, and Thomas E. Stagg, and Robert H. May, George E. Jekyll, and Arthur B. Jekyll, No. 1746, April Term, 1907, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 12th day of June, A. D. 1907.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,782. District of Columbia Court of Appeals. Term No. 123. The Sand Filtration Corporation of America, appellant, *vs.* Samuel P. Cowardin, James F. Bradley, Sydney P. Clay *et al.* Filed July 8, 1907. File No. 20,782.

SUPREME COURT OF THE UNITED STATES.

October Term, 1908.

No. 123.

SAND FILTRATION CORPORATION OF AMERICA, Appellant,

vs.

SAMUEL P. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY, and THOMAS E. STAGG, and ROBERT H. MAY, GEORGE E. JEKYLL, and ARTHUR S. JEKYLL.

BRIEF FOR APPELLANT.

A. S. Worthington,
Charles L. Frailey,
Attorneys for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 123.

SAND FILTRATION CORPORATION OF AMERICA,
APPELLANT,

vs.

SAMUEL P. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY, AND THOMAS E. STAGG, AND ROBERT H. MAY, GEORGE E. JEKYLL, AND ARTHUR B. JEKYLL.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of that District. Several questions were presented to and determined by the lower courts, but the only question which will be raised in this court is as to whether those courts correctly construed certain clauses in a contract between the appellant and a firm composed of the appellees, Cowardin, Bradley, Clay and Stagg, hereinafter referred to as Cowardin and Company.

On the 6th day of April, 1903, Cowardin and Company entered into a contract with the United States for the construction of a filtration plant in the District of Columbia.

On the 26th day of May, 1903, Cowardin and Company, by a written contract, employed the firm of May and Jekyll to do the work called for by the contract with the United States, agreeing to pay May and Jekyll 90 per cent of the money which the Government was to pay to Cowardin and Company (Record, 41).

On the 25th day of August, 1903, by another written contract between Cowardin and Company and May and Jekyll, the contract between those parties of May 26, 1903, was cancelled (39), and on the same day Cowardin and Company entered into an agreement with Henry B. Dean (trading under the firm name of Dean and Shibley), by which Dean, or a corporation to be organized by him and to be called the Sand Filtration Corporation of America, agreed to complete the contract with the Government in the place of May and Jekyll (14).

By this contract it was provided that as Cowardin and Company were insolvent a receiver should be appointed in order to wind up the business of that firm, and that Dean was to be employed by the receiver of Cowardin and Company, when appointed, to finish the work. In case the receiver should not be appointed within ten days the contract between Cowardin and Company and Dean was to be void (15).

On the day of August, 1903, a bill was filed in the Supreme Court of the District of Columbia for the appointment of a receiver for Cowardin and Company, and on the same day that court appointed John D. Maclennan as such receiver, and authorized him as such receiver to enter into a contract with Dean for the completion of the work under the Government contract. On the 27th day of August, 1903, the receiver, pursuant to the order of court, by a written contract employed Dean to complete the work of constructing the filtration plant (18).

By the agreement of August 25, 1903, between Cowardin and Company and May and Jekyll, certain payments hereinafter more particularly referred to were to be made by Cowardin and Company to May and Jekyll (40). By the agreement of the same date between Cowardin and Company and Dean, the latter assumed the obligation of making these payments to May and Jekyll (16).

By these several contracts as they then stood, the receiver would have been required to make these payments to Dean; Dean would then have been required to repay the money to the receiver; and the receiver would then make the payments to May and Jekyll. But by a supplemental agreement between Cowardin and Company and Dean, dated August 27, 1903—the same date that the contract between the receiver and Dean was entered into—it was provided that instead of the receiver paying the money to Dean and receiving it back from Dean for transmission to May and Jekyll, he, the receiver, should make the payments direct to May and Jekyll (18).

The Sand Filtration Corporation was organized by Dean and it finished the work on the filtration plant in accordance with the terms of the contract between Cowardin and Company and the Government. Thereupon the controversy arose which this court is called upon to decide, and which will now be stated.

The contract of May 26, 1903, between Cowardin and Company and May and Jekyll required the latter, among other things, to advance to Cowardin and Company the sum of $10,000, which was to be repaid by Cowardin and Company out of the installments which they were to receive from the Government for doing the work (44). By the contract dated August 25, 1903, between the same parties it was recited that there remained due from May and Jekyll to Cowardin and Company of this $10,000 the sum of $8,000, and in reference to this sum of $8,000 the last-mentioned contract contained the following language:

"The parties of the first part [Cowardin and Company] hereby covenant and agree to repay the parties of the second part [May and Jekyll], or to their order, the said sum of eight thousand dollars ($8,000) *out of the net profits* which may be realized by the parties of the first part *from the construction or erection* of that portion of said filtration plant which they have contracted with the United States to construct or erect. The said eight thousand dollars ($8,000), if the same shall not sooner be voluntarily paid by the parties of the first part to the parties of the second part shall be reserved and paid out of the ten per cent. of the contract price for said work which will be reserved to the United States; and if the parties of the first part shall not themselves continue said work under their contract with the United States or shall procure some third party or parties to perform the same, *or if the same shall be performed by any person or persons on behalf of the parties hereto of the first part, appropriate provision shall be made for the reservation and payment of said eight thousand dollars ($8,000) to the parties hereto of the second part;* it being distinctly understood and hereby declared to be the purpose of this agreement that the repayment of the eight thousand dollars ($8,000) shall be *under the contingency that the parties of the first part shall realize a profit* under said contract with the United States and not otherwise; and that *if any profit shall be so realized by them,* it shall be subjected to the payment of the said eight thousand dollars ($8,000), or so much thereof as said profits will pay and satisfy."

It will be remembered that on the same day that this contract between Cowardin and Company and May and Jekyll was entered into—May 25, 1903—Cowardin and Company entered into the contract with Dean by which the latter was to be employed to perform the work on the filtration plant for Cowardin and Company, such employment to be through the instrumentality of an agreement with a receiver to be thereafter appointed. This cotemporaneous contract between Cowardin and Company and Dean contains the following paragraph (16):

"Fourth. As consideration for the construction plant by this instrument acquired by the grantee [Dean], or The

Sand Filtration Company of America, the grantee until the said The Sand Filtration Company of America has been organized and substituted and thereafter the said last named company, assume and agree to pay all the debts of May and Jekyll specified in Schedule B hereto attached and a part hereof, when and as they or it may arrange with the several creditors, and in general to comply with the provisions and conditions of one certain agreement entered into between the grantors [Cowardin and Company] and said May and Jekyll, a copy of which is hereto attached and to be read as a part hereof, including among other provisions the payment of the sum of $8,000 to the said May and Jekyll *as in said agreement is provided*, and the payment of which is also assumed by the said grantee; and also to pay to the receiver the sum of $65,000, to be distributed thereafter as the court may direct, which said sum of $65,000 shall become due and payable as follows: The sum of $10,000 on September 15th, 1903, $15,000 on January 15th, 1904, $10,000, on March 15th, 1904, $10,000, on May 15th, 1904, and the remaining $20,000 on the completion of the said filtration plant and at the time of the final payment thereon by the United States: and the said grantee, and the Sand Filtration Company of America, when said Company shall have been substituted for the said grantee, shall also pay to the grantors or their attorney for them the sum of $3,517.50—said sum having been paid by the grantors on account of pay-roll and other expenses since the commencement of negotiation between the parties hereto, and further to pay all other expenses and obligations necessary to be incurred between the date of this contract and the execution of the formal contract with the receiver hereinafter to be appointed for the grantors."

When the filtration plant was completed and paid for by the Government it was found that the Sand Filtration Corporation of America instead of making a profit in the enterprise had sustained a loss of about $100,000. It contended that by the proper construction of its contract with Cowardin and Company it was required to pay this sum of $8,000 to May and Jekyll only out of the profits of the construction of the filtration plant and that as there were no such profits it was not liable at all. May and Jekyll, on the other hand,

insisted that the contract of Dean with Cowardin and Company of August 25, 1903, in connection with the supplemental contract between the same parties of August 27, 1903, required that the receiver should pay this sum of $8,000 to May and Jekyll whether there had been a profit in the work on the filtration plant or not.

These and other contentions being brought to the notice of the receiver, he refused to distribute the sum of $20,000 which was left in his hands until the parties should settle their differences.

On the 13th day of March, 1906, Cowardin and Company filed a petition in the case in which the receiver had been appointed setting forth in substance the foregoing facts and asking the court to issue a rule against the receiver and the Sand Filtration Corporation of America to show cause why he should not pay to Cowardin and Company $10,000 of the money which he had in his hands, and why he should not pay the further sum of $8,000 to May and Jekyll (1-6). The court issued a rule accordingly (7). Answers to the rule were duly filed by the receiver (8), by May and Jekyll (9), and by the Sand Filtration Corporation of America (11). It will appear by the petition and the answers that there were several items in controversy. On this appeal, however, no question will be made, except as to the sum of $8,000 hereinabove referred to.

The case came on for final hearing on the petition and answers, and on April 3, 1906, Chief Justice Clabaugh signed an interlocutory decree adjudging that the sum of $8,000 should be paid by the receiver to May and Jekyll, but withholding a final decree and referring the case to the auditor of the court for a report as to another subject of controversy between the parties (21). Upon the coming in of the auditor's report a final decree was entered directing the receiver to pay the sum of $8,000 in question to the solicitors of record of May and Jekyll (52). The Sand Filtration Corporation from this decree appealed to the Court of Appeals of the District. That court affirmed the decree below

(61). The opinion of the Court of Appeals was delivered by Mr. Chief Justice Shepard and will be found on pages 55 to 60 of the record.

The Sand Filtration Corporation thereupon appealed to this court. It stands in the place of Dean under the contracts described above, but as Dean made the contracts they will be hereinafter considered as though he were the party in interest.

Assignments of Error.

The Court of Appeals erred:

1st. In holding that by the true construction of the contracts of August 25 and August 27, 1903, between Cowardin and Company and Dean, the firm of May and Jekyll was entitled to have the receiver pay them the sum of $8,000 in controversy, notwithstanding the admitted fact that no profit had been realized from the construction or erection of the filtration plant.

2d. In not reversing so much of the final decree of the Supreme Court of the District of Columbia, dated October 8, 1906, as directed the receiver to pay said sum of $8,000 to the solicitors of record of May and Jekyll.

ARGUMENT.

It will be seen that the single question to be decided is whether May and Jekyll were to receive the $8,000 unconditionally, or whether it was to be paid to them only in case the filtration plant should be completed at a profit.

Whatever difficulty there might otherwise be in deciding this question, upon examination of the several contracts in the record, it seems to counsel for the appellant to disappear when due consideration is given to the fact that all these contracts (except the original agreement of May 26, 1903, between Cowardin and Company and May and Jekyll) represent practically a single and simultaneous transaction.

It is obvious that on the 25th day of August, 1903, May and Jekyll wished to be relieved of their contract; that Cowardin and Company were willing that May and Jekyll should be so relieved; that Cowardin and Company were financially unable to go on with the work themselves; that Dean was willing to undertake the completion of the filtration plant in place of May and Jekyll; and that all parties had agreed to the substitution with the condition on the part of Dean that a receiver should be appointed for Cowardin and Company, and that he should complete the filtration plant pursuant to his agreement with Cowardin and Company under an agreement with the receiver when appointed.

In the petition of Cowardin and Company upon which this case arises, they refer (4) to their contract of August 25, 1903, with May and Jekyll, and (2) "the contemporaneous contract of the same date between these petitioners and the said Dean." Indeed, both these contracts bear the same date—August 25th—and were both executed in Washington, the contract with Dean of that date expressly reciting that it was executed in Washington (17) and the contract of the same date with May and Jekyll being witnessed by Charles Cowles Tucker and Charles A. Douglass, both Washington attorneys. In the contract with May and Jekyll of August 25th, cancelling the agreement of May 26, 1903, Cowardin and Company assume certain obligations and agree that if they "shall not themselves continue said work under their contract with the United States or shall procure some third party or parties to perform the same, or if the same shall be performed by any person or persons" on their behalf, "appropriate provision shall be made for the reservation and payment of said eight thousand dollars ($8,000) to the parties hereto of the second part; it being distinctly understood and hereby declared to be the purpose of this agreement that the repayment of the eight thousand dollars ($8,000) shall be under the contingency that the parties of the first part shall realize a profit under said contract with the United States and not otherwise" (40).

It will be seen from this that not only were Cowardin and Company when this contract was executed simultaneously arranging with Dean to do the work for them, but May and Jekyll understood that the obligations of Cowardin and Company were to be transferred, with the work of completing the filtration plant, to somebody else.

So in the agreement of August 25th between Cowardin and Company and Dean, after the recital that the contract between Cowardin and Company and May and Jekyll has been cancelled, and that Cowardin and Company are financially unable to carry out their contract themselves, provision is made for the appointment of a receiver of Cowardin and Company and for the hiring of Dean by the receiver when appointed (14, 15). It does not expressly appear in the record now before the court when Cowardin and Company filed their bill for the appointment of a receiver, or when the receiver was appointed. In the petition, however, it is stated that "shortly prior to the institution of this suit, on, to wit, August 25th, 1903, the said May and Jekyll had entered into an agreement with petitioners for the cancellation of their original contract" (2). In the contract between Cowardin and Company and Dean of August 25th, provision is made for the filing of a bill and the appointment of a receiver. The contract between the receiver and Dean is dated August 27th (18), so that the bill must have been filed and the receiver appointed either on the 25th, the 26th or 27th day of August. (As a matter of fact, which it is presumed counsel will not controvert, the bill was filed by Stagg, one of the partners of Cowardin and Company, against the other three members of that firm, on the 27th day of August, and on the same day answers were filed by all the defendants; the receiver was appointed, the receiver filed his bond; and the court made an order authorizing the receiver to enter into the contract with Dean, which was in fact entered into on the same day.) And on the same day, it will be remembered, the supplemental agreement between Cowardin and

Company and Dean, providing for payments directly to May and Jekyll by the receiver, was entered into (18).

From all this it is submitted that there can be no question that the contract of August 25 between Cowardin and Company and May and Jekyll; the contract of the same date between Cowardin and Company and Dean; the filing of the bill and the appointment of a receiver; the contract between the receiver and Dean; and the supplemental agreement between Cowardin and Company and Dean, all represent the means adopted by the parties in interest to effect the single operation of having Dean employed in the place of May and Jekyll to complete the filtration plant under the contract between Cowardin and Company and the Government.

It seems equally obvious why the doing of what appears to be a simple thing required so much circumlocution.

Section 3477 of the Revised Statutes of the United States makes void all transfers and assignments of claims against the United States, unless they are executed "after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." It requires but a casual inspection of the original contract of May 26 between Cowardin and Company and May and Jekyll to show that it contains provisions which it would probably have been impossible for May and Jekyll to enforce in the face of the section referred to. But this court in March, 1899, in the case of Price *vs.* Forrest, 173 U. S., 410, decided that where a claim against the United States has been transferred to a receiver appointed by a court of competent jurisdiction that this does not constitute an assignment within the prohibition of section 3477. Hence the appointment of a receiver in this case, and the making of a contract with him by Dean under the order and approval of the court appointing the receiver.

Another thing which it is important to bear in mind seems to have been entirely overlooked by the Court of Appeals in this case, and that is that the contract with the Gov-

ernment was performed by Cowardin and Company through their receiver. In this business the United States dealt only with Cowardin or its representative, the receiver appointed by the court to act for it. The receiver employed Dean to do the work for the receiver, but Dean was only an employee of the contractor. He was not the contractor. Dean might have failed to go on with the work. His contract with the receiver might have been cancelled and some one else substituted in his place just as he had been substituted in the place of May and Jekyll, but the Government looked to Cowardin and Company, through its representative, the receiver, and when money was to be paid by the Government it was paid to Cowardin and Company, through its representative, the receiver. If there was any profit in the contract it was the profit of Cowardin and Company. True, Cowardin and Company might agree with Dean or with anybody else to pay that profit to him for a consideration, just as it might agree with Dean or anybody else that if the work was done at a loss such third person should shoulder that responsibility, but these considerations could not affect the position of Cowardin and Company as the contractor in the case.

It is with these facts in view that we approach the consideration of the language used by the parties in their contracts, the construction of which is the subject for determination.

There can be no mistaking the meaning of the contract of August 26 between Cowardin and Company and May and Jekyll (40). By that instrument Cowardin and Company were to pay the $8,000 out of the net profits which might be realized by them "from the construction or erection of that portion of said filtration plant which they have contracted with the United States to construct or erect." And further, they stipulate that if they shall procure some third party to do the work, appropriate provision shall be made for the payment of the $8,000 by such third party, and then they

add this significant, and it would seem conclusive, language—"it being distinctly understood and hereby declared to be the purpose of this agreement that the repayment of the eight thousand dollars ($8,000) shall be under the contingency that the parties of the first part shall realize a profit under said contract with the United States and not otherwise," and that "if any profit shall be so realized by them, it shall be subjected to the payment of the said eight thousand dollars ($8,000), or so much thereof as said profits shall pay and satisfy."

This case has been dealt with by the Court of Appeals in its opinion just as though the contract from which these quotations are made had been executed months or years before the date of the contract by which Dean agreed to take the place of May and Jekyll. But, as a matter of fact, on the very same day that this contract was entered into between Cowardin and Company and May and Jekyll, Dean agrees with Cowardin and Company that if a receiver shall authorize Dean to do so, he will complete the work on the filtration plant, and will assume the liabilities of Cowardin and Company to May and Jekyll, the exact language of Dean's agreement being (16) "in general to comply with the provisions and conditions of one certain agreement entered into between the grantors [Cowardin and Company] and said May and Jekyll, a copy of which is hereto attached and to be read as a part hereof, including among other provisions the payment of the sum of $8,000 to the said May and Jekyll as in said agreement is provided."

Therefore, we have a contract between A and B and a contract between B and C simultaneously executed, the contract between B and C making the contract between A and B a part of it. The contract between A and B provides that B shall pay A $8,000 in a certain contingency, and the contract between B and C provides that C in the place of B shall pay the $8,000 to A as in the agreement between A and B provided. And the question is whether under contracts so

providing C is bound to pay the $8,000 to A without regard to the contingency.

Counsel for May and Jekyll, however, insisted, and their contention has been sustained by the courts below, that Cowardin and Company are shown to have made a profit in this business by selling the plant which they acquired from May and Jekyll to Dean and that that profit is such as is contemplated by the agreement of August 25 between Cowardin and Company and May and Jekyll.

It does not sufficiently appear in this record that Cowardin and Company did make any profit in the transaction. There nowhere appears a statement showing in full what they have paid out or what they have received in connection with this Government contract. We do not think it properly can be assumed, as the Court of Appeals assumed, that the $65,000 which Dean paid or caused to be paid to Cowardin and Company was all profit, or that any part of it was profit. The Court of Appeals says that Cowardin and Company received this $65,000 "without one dollar of actual expenditure in the performance of their contract with the Government, *so far as the record shows.*" The fact is that the record does not show anything about it, except the unsupported averments of Cowardin and Company in their petition. There is no admission in the answer of the Sand Filtration Corporation that this averment is true, and neither Cowardin and Company nor May and Jekyll have attempted to prove it. The record shows only the further fact that on August 25 Cowardin and Company were financially embarrassed to such an extent that it was necessary to appoint a receiver to wind up their affairs (14).

But, aside from this, with all deference to the courts below, it is difficult to see how a supposed profit realized by the sale of articles used in the carrying out of a contract can be held to be a profit made in the construction or erection of the plant which is the subject-matter of the contract itself. This would seem to be so even if the sale of the articles took place

at one time and the agreement by a third person to pay something in consideration of a profit on the work were made at a subsequent period. But when the two things occur at one and the same time, it seems unreasonable to sustain the view of the matter which has been taken by the Court of Appeals. When Cowardin and Company on the 25th day of August, 1903, agreed to pay May and Jekyll $8,000 from the profits which might be realized out of the construction or erection of the filtration plant, they simultaneously agreed, through the instrumentality of the receiver, to employ Dean to take their place and make the payment, making their contract with May and Jekyll a part of their contract with Dean. At the same moment, and by the same contract, Dean agreed to pay to Cowardin and Company the $65,000. If the $65,000 was the profit intended, it was realized as soon as the papers were signed. In that event the time of the payment of the $8,000 would have been provided for just as the payment of the $65,000 was provided for. Instead of agreeing to pay $65,000 in installments, Dean would have agreed to pay $73,000 in installments. To adopt this construction of the contract requires that everything contained in the agreement of August 25, between Cowardin and Company and May and Jekyll in regard to a profit in the construction or erection of the filtration plant shall be struck out of the contract. It has no meaning and can be given no effect. That language can play no part in the disposition of the question under consideration, except on the theory that Cowardin and Company were to go on with the contract through their receiver and his employment of Dean, and that if in doing the work in that way it turned out that there was a profit, the $8,000 should be paid out of that profit, or, to quote the contract, "so much thereof as said profits will pay and satisfy."

The contract between Dean and the receiver was made on the 29th day of August, 1903. The filtration plant was not completed, as the petition of Cowardin and Company states, until "on or about the — day of January, 1906" (3). If

the supposed profit of $65,000, made by Cowardin and Company by the sale of their plant to Dean in August, 1903, was the profit out of which the $8,000 was to be paid to May and Jekyll, why did May and Jekyll wait until 1906 to demand it? Indeed, who can read the contracts in question and find out when the $8,000 was due, if it was not due either on the 25th day of August, 1903, or at the end of the work, when it was ascertained whether the work was done at a profit or not. And if it was due on the 25th day of August, 1903, why were so many unnecessary provisions about it inserted in the contract of that date between Cowardin and Company and May and Jekyll? (40).

It will be argued that there is nothing in the record to show that May and Jekyll had anything to do with the contract between Cowardin and Company and Dean—that there was no privity between them and Dean. But in their contract of August 25, May and Jekyll expressly agreed that Cowardin and Company might employ some third person to finish the work under the Government contract, and when the receiver was appointed and their dealings thereafter were with the receiver, it is inconceivable that they did not know of the employment of Dean. And if they did know it, and their present construction of that part of their contract with Cowardin and Company was their construction then, why did they not go to Cowardin and Company, or the receiver, or Dean, and demand their $8,000?

To be sure, as the Court of Appeals says, all parties in August, 1903, no doubt took it for granted that a profit would be realized under the contract with the Government. But that does not indicate, as that court holds, that for that reason Dean unconditionally agreed to pay the $8,000. It indicates, on the contrary, that May and Jekyll were content to wait till the work was all done and paid for by the Government, and then get the $8,000 out of the sure profits.

Finally, counsel for May and Jekyll rely upon the supplemental contract between Cowardin and Company and Dean of August 27, 1903 (18). Here they claim privity appar-

ently, while denying it as to the contract to which the agreement of August 27 is supplementary. Upon examination of the contract of August 25 between Cowardin and Company and Dean it will be seen that it provides that Cowardin and Company shall pay *to the receiver* the installments making up the sum of $65,000 (16). There is in that contract no provision as to when or through whom the $8,000 was to be paid. The contract of August 27 between Cowardin and Company and Dean (18) merely clears up certain ambiguities in the contract of August 25. It does away with circuity of procedure by providing that instead of the installments of the $65,000 and the $8,000 being paid by the receiver to Dean, then back by Dean to the receiver, and then by the receiver to May and Jekyll, they shall be made directly by the receiver to May and Jekyll. In the preamble of this contract of August 27 it is expressly stated that the object in making it is to clear up the meaning of provisions "apparently capable of inconsistent constructions" which are contained in the contract between the same parties of August 25 "and in the accompanying paper." The accompanying paper here referred to must be the copy of the contract of August 25 between Cowardin and Company and May and Jekyll, which is attached to and made a part of the contract of that date between Cowardin and Company and Dean. If, as we think we have shown is the case, by the true construction of the contract between Cowardin and Company and Dean of August 25, the $8,000 was not to be paid to May and Jekyll unless a profit was made in doing the work under the Government contract, it is impossible to hold that by the supplemental agreement of August 27 Dean agreed that the $8,000 should be paid to May and Jekyll unconditionally. If that had been the intention something would have been stated as to when the $8,000 was to be paid. But as neither that contract nor the one to which it is a supplement fixes any time for the payment of the $8,000, the latter contract but affirms the conclusion reached by a consideration of the earlier one; that the reason no time was fixed for the

payment of the $8,000 was because whether it should be paid at all depended upon whether there should be a profit in the doing of the work, and that could not be determined until the work was finished and accepted by the Government and the final payments made by the Government.

In significant contrast with the language of the contracts in evidence in reference to the $8,000 are the provisions in regard to another sum referred to in the same instruments. In the contract of August 25 between Cowardin and Company and Dean the latter agrees to pay to Cowardin and Company the sum of $3,517.50, money paid by Cowardin and Company on account of pay-roll and other expenses during the negotiations between the parties, and to pay all other expenses necessary to be incurred between August 25 and the execution of the proposed contract between Dean and the receiver to be thereafter appointed (16). In this agreement of August 25 nothing is said as to *when* this $3,517.50 shall be paid. This is one of the ambiguities cleared up by the supplemental agreement of August 27 (17, 18). That provides that it shall be paid in cash simultaneously with the execution of the contract with the receiver. Why when the parties were thus dealing deliberately and specifically with the manner and time of the payment of obligations assumed by Dean was nothing said about when the $8,000 should be paid? Why was that matter left in the air? There can be but one answer to that question. Nothing was said on that subject because the $8,000 was to be paid from profits not yet earned and which might never be earned.

It is respectfully submitted that the decree of the Court of Appeals as to this $8,000 should be reversed, and that court directed to remand the case to the Supreme Court of the District of Columbia, with instructions to modify its decree so as to require the receiver to pay to the appellant the sum of $8,000 in controversy.

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Attorneys for Appellant.

Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 123.

SAND FILTRATION CORPORATION OF AMERICA, APPELLANT,

vs.

SAMUEL P. COWARDIN ET AL., APPELLEES.

BRIEF FOR COWARDIN, BRADLEY, CLAY AND STAGG.

J. J. DARLINGTON,
Solicitor for Cowardin, Bradley, Clay and Stagg.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

BRIEF FOR COMMERCIAL, DRAPER, CLAY AND STACK.

IN THE

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BRIEF FOR COWARDIN, BRADLEY, CLAY AND STAGG.

Statement.

This cause, as it came to this court, involved two sums of money, one of $2,000 and the other of $8,000, in the hands of the receiver of Cowardin, Bradley, Clay & Co., a firm composed of the appellees Cowardin, Bradley, Clay and Stagg. The appellant, in its brief, abandons its contention in regard to the sum of $2,000, which the auditor, the Supreme Court of the District of Columbia and the Court of Appeals had concurred in awarding to Cowardin, Bradley, Clay & Co. So much of the decree below, therefore, as requires the receiver to pay to these appellees the sum of $2,000, it is conceded should be affirmed, with costs and interest.

The facts upon which the controversy with respect to the fund of $8,000 depends are briefly as follows:

Cowardin, Bradley, Clay & Co., having a contract with the United States Government for the construction of a

filtration plant for the city of Washington, and having expended $1,373.07 in money and incurred liabilities to the amount of $14,286.82 in performance of the contract (Rec., pp. 47–8), sublet the work of completing it to the appellees May, Jekyll and Jekyll, trading under the firm name of May & Jekyll, on May 26, 1903, under a contract between them set forth at pages 41–6 of the record—the substantial features of which, for present purposes, were that May & Jekyll should reimburse Cowardin, Bradley, Clay & Co., all their expenditures, should pay all the liabilities incurred by them under their contract, and should complete the work for 90 per cent of the contract price, leaving to Cowardin, Bradley, Clay & Co. the remaining 10 per cent as their profit; and, further, that May & Jekyll should lend to Cowardin, Bradley, Clay & Co. the sum of $10,000, to be repaid by the latter out of their said profit when realized.

On August 25, 1903, a further contract was made between the two firms under which May & Jekyll surrendered their subcontract, and, in consideration of being relieved of it, and of their unpaid liabilities incurred in attempting to perform it, they executed a bill of sale to Cowardin, Bradley, Clay & Co. of the plant which had been accumulated for the purpose of the work, inventoried in Schedule A (Rec., pp. 49–51), as of the value of $101,651.10, it being a further provision of said contract of August 25th that the $8,000 which then remained unpaid of the said $10,000 which May & Jekyll had loaned Cowardin, Bradley, Clay & Co. pursuant to the contract of May 26, 1903, should be paid to May & Jekyll "out of the net profits which may be realized by the parties of the first part," i. e., Cowardin, Bradley, Clay & Co., "from the construction or erection of that portion of the said filtration plant which they have contracted with the United States to construct or erect;" and that, in case Cowardin, Bradley, Clay & Co.

should procure a third party to complete the work, they would make appropriate provision for the payment of the said $8,000 to May & Jekyll, "it being distinctly understood, and hereby declared to be the purpose of this agreement, that the repayment of the eight thousand dollars ($8,000.00) shall be on the contingency that the *parties of the first* shall realize a profit under said contract with the United States, and not otherwise; and that, if any profit shall be so *realized by them*, it shall be applied to the payment of the said eight thousand dollars ($8,000.00), or so much thereof as said profits will pay and satisfy."

On the same day, August 25, 1903, Cowardin, Bradley, Clay & Co., entered into a contract with Henry B. Dean, trading under the firm name of Dean & Shibley, under which in consideration, in substance, of the sale to Dean & Shibley, or to the Sand Filtration Company of America, a corporation to be organized by them, of the said construction plant, and of being employed to complete the filtration contract, Dean & Shibley agreed to pay Cowardin, Bradley, Clay & Co., $65,000, in stipulated instalments as the money was received from the Government for the work, and, further, that Dean & Shibley, or their said corporation, would comply with the provisions and conditions of the agreement of that date between Cowardin, Bradley, Clay & Co., and May & Jekyll, "including, among other provisions, the payment of the sum of $8,000.00 to the said May & Jekyll as in the said agreement is provided, and payment of which is also assumed by the said grantee."

As provided in the said last named agreement, Cowardin, Bradley, Clay & Co., procured the appointment of a receiver for their firm, who, with the court's approval, entered into a contract with Dean on August 27, 1903 (Rec., pp. 18–20), substantially in accordance with the terms of his agreement of August 25th. The

work was completed, the stipulated $65,000 has been paid to Cowardin, Bradley, Clay & Co. with the exception of the $2,000, payment of which was suspended by the appeal in this case, and the only question now in controversy is whether, the Sand Filtration Company having lost money under its subcontract, May & Jekyll are entitled to payment of the $8,000, which is in the hands of the receiver for that purpose if applicable to it.

Under the terms of the agreement between Cowardin, Bradley, Clay & Co. of August 25, 1903, the $8,000 was to be paid to the latter upon a single contingency, namely, that a net profit should be realized "by the *parties of the first part*"—i. e., by Cowardin, Bradley, Clay & Co., from the construction of the filtration plant, whether by themselves or through the instrumentality of some third party procured by them to perform the work. The appellant claims this contingency has not happened,

1. Because the Sand Filtration Company, the third party procured by Cowardin, Bradley, Clay & Co., to perform the work, did so at a loss, instead of at a profit.

2. Because it does not appear by the record that Cowardin, Bradley, Clay & Co. have realized a profit.

I.

The first of these propositions, it is submitted, is concluded by the very language of the agreement of August 25th, under which the question arises. That agreement was that Cowardin, Bradley, Clay & Co. should pay or cause to be paid to May & Jekyll the said sum of $8,000 if *they*, Cowardin, Bradley, Clay & Co. should realize a profit under their contract sufficient for the purpose, and that any profit realized *by them* should be subject to the payment of that sum, or of so much of it as the profit realized would pay. This obligation upon the part of Cowardin, Bradley, Clay & Co. was assumed, in

terms, by Dean in his contract of the same date, and is again assumed in substance in his contract with the receiver on August 27, 1903, the latter agreement providing (Rec., p. 20) that the receiver should deduct from the amounts paid by the United States for the work "the amounts to be paid to or for the benefit of Cowardin, Bradley, Clay & Co. as provided for in the certain contract of sale, dated August 25, 1903, between the said Cowardin, Bradley, Clay & Co., and the party of the second part," i. e., Henry B. Dean. No support, in any of the agreements, is found for the suggestion that the $8,000 was not to be paid to May & Jekyll unless Dean, or the Sand Filtration Company, or any third party who should contract with Cowardin, Bradley, Clay & Co. for the completion of the work, should realize a profit.

II.

The second proposition contended for, namely, that the record fails to show a profit to Cowardin, Bradley, Clay & Co., is equally untenable.

The Supreme Court of the District of Columbia found, as a matter of fact, that there was such a profit (Rec., p. 21), which finding of fact was confirmed by the Court of Appeals (Rec., pp. 59–60). That the concurrent findings of the two courts upon a question of fact will not be disturbed in this court except upon a clear establishment of error by the evidence is a familiar rule. The evidence, however, is clearly and conclusively with the findings below.

At the date of the original contract between Cowardin, Bradley, Clay & Co. and May & Jekyll of May 26, 1903 (Rec., pp. 41, 47–48), the total outlays of the former firm under its contract with the Government, in both money and liabilities, was $15,659.79, all of which was at that time made good to it by May & Jekyll. It has at no time

since made any outlays, or incurred any liabilities, Dean & Shibley having taken up the work where May & Jekyll laid it down, and carried it forward to completion. In addition to the $8,000 advanced to it by May & Jekyll, which is to be repaid, if at all, by the appellant, the firm of Cowardin, Bradley, Clay & Co. has received $63,000 in cash from the receiver, and, it is now conceded, will receive the remaining $2,000, upon the affirmance by this court of the decree below in respect to that fund. If not profit, what is this $73,000?

It is respectfully submitted that there was no error in the decree below, and that it should be affirmed.

J. J. DARLINGTON,
Solicitor for Cowardin, Bradley, Clay and Stagg.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 123.

THE SAND FILTRATION CORPORATION OF AMERICA, APPELLANT,

vs.

SAMUEL P. COWARDIN ET AL., APPELLEES.

BRIEF FOR APPELLEES, MAY & JEKYLL.

STATEMENT OF FACTS.

This is an appeal by the Sand Filtration Corporation of America from an order of the Supreme Court of the District of Columbia, made on October 8, 1906, in the cause of Stagg *v.* Cowardin *et al.*, to which the appellant was a party, and whereby John D. MacLennan, receiver in that cause, was directed to pay out of moneys in his hands the sum of $8,000 to the appellees, May & Jekyll, and $2,000 to the appellees, Cowardin, Bradley, Clay & Company (52-53).

Cowardin, Bradley, Clay & Company, a partnership (hereinafter, for the sake of brevity, called Cowardin and associates), were the original contractors with the United States for the construction of a portion of the sand filtration plant recently built in the District of Columbia. On May 26, 1903, when only a little work had been done under their contract, Cowardin and associates entered into an agree-

ment in writing with the appellees, May & Jekyll, contractors, whereby the latter were employed by the former to complete the contract with the United States (41). By the terms of this agreement it was provided, among other things, that May & Jekyll, in return for their services, were to receive 90 per cent of the contract price received by Cowardin and associates from the United States; that May & Jekyll should advance to Cowardin and associates $10,000, to be repaid to May & Jekyll out of the share of Cowardin and his associates, to be reserved to them from the first partial payment to be made by the United States as the work progressed (44), and that, as a guarantee that they would fully perform and complete the work, May & Jekyll should deposit $50,000 with Darlington & Tucker, trustees, to be expended in the purchase of a construction plant, to be used for the purpose of carrying out the contract with the United States; that the plant should consist of certain articles and implements already purchased and contracted for by Cowardin and associates, and also such additional implements and articles as might be selected by May & Jekyll (43).

On August 25, 1903, May & Jekyll, desiring to abandon the work which they had agreed to do under their previous contract, entered into a new agreement with Cowardin and associates (39), whereby it was agreed that the old contract should be canceled and the obligations of all the parties thereto finally discharged. May & Jekyll, having contracted certain debts in the course of the work, aggregating $34,176.10, Cowardin and associates agreed, by the contract of August 25, 1903, to assume such debts, and to procure the assumption thereof by any third party or parties who might thereafter undertake to complete the contract of Cowardin and associates with the United States. It was also agreed by May & Jekyll that they would have the $50,000 plant they had purchased through the trustees, Darlington & Tucker, and all of the articles of personal property on the site of the filtration plant which they had acquired since they

had undertaken the work, transferred to Cowardin and associates, and Cowardin and associates, in return, agreed to then transfer in trust to Douglas and Kimball, trustees, all of the articles of personal property so to be transferred to them to secure the payment of the debts due from May & Jekyll, as aforesaid.

The contract of August 25, 1903, also contained this provision (39-41):

"Inasmuch as the parties of the second part [May & Jekyll] have heretofore advanced to the parties of the first part [Cowardin and associates] the sum of $10,000 under the eighth paragraph of said contract of May 26, 1903, and there now remains due to the parties hereto of the second part $8,000 thereof, $2,000 having been paid thereon, the parties of the first part hereby covenant and agree to repay the parties of the second part, or to their order the said sum of $8,000 out of the net profits which may be realized by the parties of the first part from the construction or erection of that portion of said filtration plant which they have contracted with the United States to construct or erect. The said $8,000, if the same shall not be sooner voluntarily paid by the parties of the first part to the parties of the second part, shall be reserved and paid *out of the 10% of the contract price for said work which will be reserved by the United States;* and if the parties of the first part shall not themselves continue said work under their contract with the United States, but shall procure some third party or parties to perform the same, or if the same shall be performed by any person or persons on behalf of the parties hereto of the first part appropriate provision shall be made for the reservation and payment of said $8,000 to the parties hereto of the second part; it being distinctly understood and hereby declared to be the purpose of this agreement that the repayment of the $8,000 shall be under the contingency that the parties of the first part shall realize a profit under said contract with the United States, and not otherwise; and that if any profit shall be so realized by them, it shall be subject to the payment of the said $8,000, or so much thereof as said profit will pay and satisfy."

It will be observed that the $8,000 mentioned in the quoted extract from the contract last mentioned was to be paid to May & Jekyll "out of the 10 per cent of the contract price for said work which will be reserved by the United States."

This contract of August 25, 1903, ended the connection of the appellees May & Jekyll with the work of constructing the filtration plant, and their only interest thereafter in the work grew out of their claim for the $8,000 mentioned, provided Cowardin and associates should make a profit out of the contract.

On the same day that the second contract with May & Jekyll was executed, namely, August 25, 1903, Cowardin and associates made a contract with Henry B. Dean, trading as Dean & Shibley (14-17), which recited that Dean was interested in the formation of the Sand Filtration Corporation of America, about to be incorporated under the laws of the State of Virginia, to continue the work of constructing the filtration plant as an employee of Cowardin and associates. By this last-mentioned contract Cowardin and associates agreed to transfer to Dean all of the construction plant that they had acquired from May & Jekyll and from the trustees, Darlington & Tucker. In consideration of this transfer, and in further consideration of the agreement of Dean, for himself and the proposed corporation, the Sand Filtration Corporation of America agreed to pay to Cowardin and associates the sum of $65,000, and Dean, for himself and for such proposed corporation, agreed to complete the work of constructing the filtration plant as employees of Cowardin and associates and Dean for himself, and the proposed corporation agreed "to comply with the provisions and conditions of one certain agreement entered into between the grantors (Cowardin and associates) and May & Jekyll, a copy of which is hereto attached and to be read as a part hereof, including, among other provisions, the payment of the sum of $8,000 to the said May & Jekyll, as in the said agreement is pro-

vided, and the payment of which is also assumed by the said grantee" [Dean] (16).

As, however, Cowardin and associates were in financial difficulties, it was agreed that a receiver should be appointed for them and that a contract should be subsequently made between said receivers and Dean, carrying out the provisions of their contract of August 25, 1903, with Cowardin and associates.

Two days later, namely, on August 27, 1903, and apparently after the receiver was appointed, a supplemental agreement was made, and it provided that the receiver of Cowardin and associates was authorized to deduct from the moneys to be paid to him by the Government as the work of construction progressed the sum of $65,000, and also the sum of $8,000 therein mentioned, and to pay the same directly to Cowardin and associates instead of paying it to Dean and then receiving such payments back from Dean, as was apparently provided for by the agreement of August 25, 1903 (17-18).

There is nothing in the record to show that May & Jekyll had any knowledge whatever of this contract of August 25, 1903, between Cowardin and associates and Dean, or that there was any privity of contract whatever between May & Jekyll and Dean. In fact, Mr. Dean, in the proceedings before the auditor to be mentioned, testified that his firm had no connection whatever with May & Jekyll in the transaction, although he had some knowledge of their previous connection with the matter.

After the contract of August 25, 1903, between Cowardin and associates and Dean had been executed, a bill was filed in the lower court by Thomas E. Stagg, one of the members of the firm of Cowardin, Bradley, Clay & Company, against his copartners for the appointment of a receiver, and John D. MacLennan was appointed receiver of the partnership. On August 27, 1903, he entered into a contract with Henry B. Dean, doing business as Dean & Shibley (18), by the

terms of which Dean agreed to carry out the provisions of the previous contract with Cowardin and associates until the proposed corporation should be organized, when it in turn should assume the contract in question. Provision was also made for the payment by the receiver to Dean, and later to the proposed corporation, of all of the moneys received from the United States, excepting the sum of $65,000, or any part of it, and the other amounts specified to be paid to Cowardin and associates or for their benefit (20).

Thereafter the appellant, The Sand Filtration Corporation, seems to have been organized and to have taken the place of Dean under the several contracts mentioned. The work of constructing the filtration plant under the contract with the United States was completed and accepted by the United States in January, 1906, and full payment therefor was made by the United States to MacLennan as receiver for Cowardin and associates. Out of the installments paid by the Government the receiver had paid to Cowardin and associates $45,000 on account of the $65,000 due them, and out of the final payment he paid them $10,000.

Having failed to pay Cowardin and associates the remaining $10,000 due on account of the $65,000, and also the $8,000 which was to be paid to May & Jekyll in event that Cowardin and associates should realize a profit under the contract, as set forth in their contract with the latter of August 25, 1903, Cowardin and associates on March 13, 1906, filed a petition for a rule upon the receiver to show cause why he should not pay these two amounts so retained by him, for a rule on May & Jekyll to show cause why the receiver should not pay to them the said sum of $8,000, and for a rule on the Sand Filtration Corporation to show cause why such payments should not be made. This petition set forth that the refusal of the receiver to pay the said $8,000 to May & Jekyll was based upon two grounds, only one of which it is necessary to mention here, and that was, namely, "That the $8,000 was not to be paid under the terms of the

contract of August 25, 1903, between the said firm of May & Jekyll and these petitioners and the contemporaneous contract of the same date between these petitioners and the said Dean, unless the petitioners realized a profit from their said contract with the United States Government, and, as is contended by the said Sand Filtration Corporation, unless the said Dean or the said company also realized a profit from the said contract, which latter contingency it claims has not occurred, the said work having been completed at a loss, as it alleges, and as these petitioners believe to be true" (4).

The answer of MacLennan, the receiver, admitted the retention by him of the fund, but stated that he was advised that it was unnecessary for him to state in full the contention of the Sand Filtration Corporation, because that company would fully set forth its claim in its answer to the rule laid upon it (8).

The answer of the Sand Filtration Corporation averred that no profits were realized from the work, but that the work was completed at a loss to it of $150,000, and that therefore there was no liability on the part of the petitioners to pay May & Jekyll the $8,000 or any part of it. They further averred that even if the petitioners Cowardin and associates were required to pay the $8,000 to May & Jekyll under the contract of August 25, 1903, the Sand Filtration Corporation was not required to pay that sum or any part of it to the petitioners.

The answer of May & Jekyll avers that under the contract of August 25, 1903, the $8,000 was payable to them, conditioned only upon the making of a net profit by the petitioners, and was not in any way conditioned upon the making of a net profit by any other person or persons or corporation whatever.

The matter having come on to be heard by the lower court upon the petition and the several answers, that court decided that Cowardin and associates had derived a profit under their contract with the Government within the mean-

ing of their contract with May & Jekyll; but it was ordered that another matter concerning which the appellant made a contention, which, however, it abandons on the present appeal, be referred to the Auditor for report (20-21).

Under this order of reference testimony was taken before the Auditor. In view of the abandonment by appellant of all contentions heretofore made by it, save the one relating to the $8,000 it is unnecessary to refer to the testimony taken before the Auditor, save to say that Mr. Dean testified that he had no connection whatever with May & Jekyll in the transaction and did not know that he had bought the articles on the same day that May & Jekyll executed an agreement transferring them to Cowardin and associates, although he had some knowledge of May & Jekyll's previous connection with the matter (37).

The Auditor reported in favor of the appellees and the Sand Filtration Corporation filed exceptions to this report. The court heard the exceptions and passed an order overruling them and directing the receiver to pay forthwith, out of money in his hands, $8,000 to May & Jekyll and $2,000 to Cowardin and associates.

From this order the Sand Filtration Corporation appealed to the Court of Appeals, the latter court affirmed the decree appealed from, and the appellant prosecuted the present appeal.

ARGUMENT.

All of the other contentions made by the appellant in the courts below having been abandoned by it, the single question sought to be raised on this appeal is whether the members of the firm of May & Jekyll are entitled to receive the sum of $8,000 from the receiver of Cowardin and associates. If the appellant is not precluded from raising this question by its express agreement that the receiver should pay the $8,000 to May & Jekyll—as contended in the last paragraph of this brief—the answer to the question depends upon

whether Cowardin and associates made a profit of at least that sum from their contract with the Government. It should be borne in mind that the status of Cowardin and associates, from the time of the acceptance of their bid by the Government until the completion of the work and its final acceptance by the Government, was that of contractors with the Government. May & Jekyll and later Dean, and still later the appellant, were merely employees of the contractors, and after the receiver was appointed for them, employees of such receiver. It is utterly immaterial whether the appellant, as an employee of the receiver, made a profit or sustained a loss by reason of its contract of hiring with the receiver.

Counsel for appellants correctly states the conditions of affairs as between the various parties to this suit, when, after referring to the contract between Cowardin and associates and Dean, whose place was taken by the Sand Filtration Corporation of America, appellant herein, as to the appointment of the receiver of Cowardin and associates, when he says on page 11, "Dean was only an employee of the contractor." Dean, as such employee, undertook the whole responsibility of carrying out the work for the receiver, and could receive the moneys paid by the Government on account of completion of the work only from the receiver, and not directly from the Government. True, the Government looked to Cowardin and associates or its representative and receiver to carry out the contract, and Cowardin and associates could easily, as they in fact did, make a profit out of the contract with the Government, while Dean or the appellant herein lost. It is immaterial to the issue to be decided herein, we repeat, whether the appellant lost or not so long as Cowardin and associates, who are the only parties with whom May & Jekyll contracted, made a profit.

By the contract of August 25, 1903, Cowardin and associates in terms agreed that the $8,000 in question, "if the same shall not sooner be voluntarily paid by the parties of

the first part [Cowardin and associates] to the parties of the second part [May & Jekyll] shall be reserved and paid out of the 10 per cent of the contract price for said work, which shall be reserved by the United States. * * * It being distinctly understood and hereby declared to be the purpose of this agreement, that the re-payment of the $8,000 shall be under the contingency, that the parties of the first part shall realize a profit *under said contract with the United States,* and not otherwise; and if any profit shall be realized by them, it shall be subject to the payment of the said $8,000, or so much thereof as such profit will pay and satisfy."

The contract by May & Jekyll with Cowardin and associates, dated August 25, 1903, was made part of the contract between Cowardin and associates, and Dean, and had been executed prior to the Dean contract, though on the same day. According to Dean's own statement (37) he had no connection whatever with May & Jekyll in this transaction. The latter contract with Dean makes the former contract with May & Jekyll a part thereof, and requires him "in general to comply with the provisions and conditions of one certain agreement entered into between the grantors and said May & Jekyll, a copy of which is hereto attached, and to be read as part thereof, including amongst other provisions *the payment of the sum of $8,000. to the said May & Jekyll,* as in said agreement is provided, and the payment of which is also assumed by said grantee" (16).

The supplemental agreement (18) interpreting the former contract between Cowardin and associates and Dean provides that the receiver may pay the sum of $65,000, as received in installments from the Government directly to Cowardin and associates, and also the sum of $8,000 directly to them, instead of paying the same first to Dean and receiving such sums back from Dean as would appear to be required by the agreement of August 25. The appellant

acted on this subsequent agreement by causing or permitting the receiver to pay in instalments, as they fell due, $55,000 of the $65,000, directly to Cowardin and associates, as set forth on page 3 of the record in the 4th paragraph of the petition for rule for receiver. This is admitted by the answer (11) of the appellants. Having consented, acquiesced and acted upon one part of this contract, the appellants are now estopped from denying the remaining portion of this contract, namely the authority of the receiver to pay the $8,000 directly to Cowardin and associates, or their assigns, under the contract of August 25, 1903, namely, the firm of May & Jekyll.

The appellant and its predecessor, Dean, under whom it claims, not only had notice of the claim of May & Jekyll, and bound themselves to pay it, but expressly agreed that the amount of the claim *should be deducted from and paid out of the moneys to be collected by the receiver from the Government.* Now that the receiver has the $8,000 in his hands, the appellant seeks to repudiate the contract made for it by Dean. It says in its answer to the rule that there is no liability on its part "to pay to the firm of May & Jekyll the said sum of $8,000 or any part thereof." That is not the question here, which is, whether the *receiver* shall pay that sum out of moneys reserved for that specific purpose as expressly agreed by the parties.

The appellant in its answer then goes on to say that even if Cowardin and associates "be required by the true construction of their contract of August 25, 1903, with said May & Jekyll to pay said sum of $8,000 to May & Jekyll, neither said Dean nor this respondent (the appellant), as his successor, is required to pay said sum, or any part thereof" to Cowardin and his associates. The appellant again begs the question. The question is not whether the appellant shall pay the $8,000 to Cowardin and associates, but whether *the receiver* shall deliver to May & Jekyll, or to Cowardin and associates for them, the $8,000 under the ex-

press agreement of Cowardin and associates and the appellant that he should do so.

Dean, when contracting with Cowardin and associates, had full opportunity to embody in his contract a provision that he, Dean, or his successors, the appellant herein, should not submit to compliance with the terms of the agreement contained in the contract between Cowardin and associates, and May & Jekyll, in reference to the payment of the $8,000, unless, he, the said Dean, or his associates, received a profit from the whole work. This he did not do, and having reduced his contract to writing and acted thereon, he is bound by the terms thereof, and cannot now read into his contract words which would alter its meaning. Dean failed to embody in his contract any provision making the payment of the $8,000 conditional upon his, Dean's, or his assign, receiving a profit on the enterprise, and therefore the contention of the appellant that it did not make any profit on the enterprise is immaterial to the point at issue.

With the exception of the condition contained in the contract between Cowardin and associates, and May & Jekyll, there is not one phrase, word or sentence, to be found in any contract or agreement in the record, which imposes any restriction on the payment of the $8,000, out of the 10 per cent of the contract price for said work which was reserved by the United States. The receiver now holds more than $8,000 of this "10 per cent of the contract price," and it is plainly due May & Jekyll, by the express and repeated agreement of all parties.

DID COWARDIN AND ASSOCIATES REALIZE A NET PROFIT OUT OF THEIR CONTRACT WITH THE UNITED STATES?

The opinion of the Court of Appeals, by the Chief Justice of the court, contains a very clear statement in regard to Cowardin and associates realizing a net profit from their contract with the Government. It is as follows:

"The court was right also in holding that the Cowardin Co. derived net profits or more than $8,000 from their contract with the Government. May & Jekyll not only repaid them every dollar of their original outlay—$15,000, in round numbers—but also turned over to them $50,000 worth of additional construction plant and material that had been purchased by them. In the new contract with the Filtration Corporation, the latter assumed the complete performance of the Government contract for the money payable thereunder, and made performance secure by the exacted bond in the sum of $150,000. The Filtration Corporation, in order to secure this contract, took over the plant which had been relinquished by May & Jekyll to the Cowardin Co. at the agreed price of $65,000, payments of which in installments were required to be deducted from the Government's payments by the receiver and paid to the Cowardin Co. Notwithstanding the losses of May & Jekyll on the one hand, and the Filtration Corporation on the other, the Cowardin Co. realized a net profit of say $65,000. Without one dollar of actual expenditure in the performance of their contract with the Government, so far as the record shows, they secured its performance by others, and received the sum of $65,000 for the plant mainly derived from May & Jekyll, who gave it up in order to be released from their first contract."

By an examination of the record it will be seen that reasoning of the Chief Justice is sound in fact and conclusion. The record shows as follows:

The original contract between Cowardin and associates with the Government was dated April 6, 1903. By the contract between Cowardin and associates with May & Jekyll, dated May 26, 1903, the latter agreed (41) to assume and pay the existing obligations and expenses incurred and paid by Cowardin and associates, amounting to $3,145.63, made up of the following items (47): (1) "Obligations due and expenses incurred to be assumed and paid by May & Jekyll," $839.87; (2) "Expenses heretofore paid by Cowardin, Bradley, Clay & Co., to be repaid them by May & Jekyll," $2,305.76.

By the seventh paragraph of the same contract (page 43) May & Jekyll, in order to guarantee the performance of this contract, paid to Darlington and Tucker, trustees, $50,000, to be expended by them for the purchase of the plant. "Said plant shall consist of certain articles and implements already purchased and contracted for by the parties of the first part (Cowardin and associates), and set forth and described in Schedule B, hereto annexed and made a part hereof; and also all such additional implements and articles as may be selected by the parties of the second part." The record (47-48) shows the total amount of expenditure by said trustees for plant of Cowardin and associates was $15,569.79, of which $1,373.07 was repaid to said Cowardin and associates by the trustees for payments already made by them on account of the plant.

In addition to such assumption of the obligations of Cowardin and associates by May & Jekyll, and the repayment by May & Jekyll to Cowardin and associates of all expenditures made by the latter on account of their contract, the firm of May & Jekyll, by the eighth paragraph of this contract (44), agreed to advance Cowardin and associates $10,000, to be repaid and therein specified. Of this $10,000 $2,000 was repaid, and the remaining $8,000 is now subject to controversy.

Coming now to the contract of August 25, 1903, between Cowardin and associates and May & Jekyll (39), cancelling the contract of May 26, 1903, we find by the second paragraph thereof that Cowardin and associates covenanted and agreed "to assume and procure the assumption thereof by any third party or parties who may hereafter undertake to complete the contract of the parties hereto of the first part (Cowardin and associates) with the United States, mentioned in the contract of May 26, 1903, at the instance or request of the parties of the first part as shown on the schedule annexed hereto, and made a part hereof, and marked 'Schedule A.'" This schedule (49) shows a total of $34,176.10.

By the third paragraph of this same contract, May & Jekyll surrendered and assigned to Cowardin and associates all their right, title, and interest in all things pertaining to the filtration plant and work, and agreed to procure from the trustees, Darlington and Tucker, a bill of sale to Cowardin and associates of all the articles of personal property then vested in said trustees, as per Schedule B (50-51), amounting in value to $101,651.10.

In the contract dated August 26, 1903, between Cowardin and associates and Dean, which contract was made in contemplation of a receiver being appointed for Cowardin and associates, it is provided (16):

1. That the appellants [as we term Dean and his successors] assumed and agreed to pay all the debts of May & Jekyll specified in Schedule B; also to comply with the terms of the agreement between Cowardin and associates and May & Jekyll, "including amongst other provisions the payment of the sum of $8,000 to the said May & Jekyll, as in said agreement is provided [that is, out of the ten per cent retent] and the payment of which is assumed by the said grantee" (the appellants herein). This further provides for the payment to the receiver of the sum of $65,000 for the privilege of undertaking to complete the work.

In order further to protect themselves, Cowardin and associates required the appellant to pay them the sum of $3,517.50, "said sum having been paid by the grantors (Cowardin and associates) on account of pay-roll and other expenses since the commencement of negotiation between the parties hereto."

By the supplemental contract of August 27, 1903, between the same parties, explaining the last-mentioned contract, it is provided that the $65,000 and the $8,000 should be paid directly by the receiver to Cowardin and associates (18).

In the fourth paragraph of the petition for rule on receiver (3) filed by Cowardin and associates and admitted in the answer of the appellants (11) it is alleged, under oath,

that the work covered by the contract with the United States was completed and accepted and full payment therefor had been made to the receiver, and that the receiver holds in his hands the $8,000 in controversy.

It will be thus seen that all moneys Cowardin and associates expended on their contract with the Government were repaid them by May & Jekyll, who also assumed Cowardin and associates' then existing financial obligations; that when the first contract with May & Jekyll was cancelled, Dean, and later the appellants, agreed to, and did, assume all of May & Jekyll's obligations and thus relieved Cowardin and associates; and also paid Cowardin and associates $65,000 for the privilege of carrying on the contract, in addition to which they paid Cowardin and associates the $3,517.50 for expenses incurred by Cowardin and associates in connection with the enterprise during the negotiations. In addition, the appellants gave a bond in the penal sum of $150,000 for the faithful performance of the work. The work was faithfully performed. The contract price therefor was paid to the receiver without Cowardin and associates being required to expend a single dollar which had not already been repaid them under the terms of the various contracts heretofore referred to. In addition to thus being reimbursed for all expenditures, and protected from all further liability, Cowardin and associates received from the appellants $55,000 of the $65,000 (the receiver now holding the balance) which in every aspect of the case must have been net profit to Cowardin and associates realized from the construction and erection of the filtration plant which they had contracted with the United States to construct and erect.

In addition to the foregoing, the petition of Cowardin and associates, made under oath, states (4): "The $55,000.00 thus far paid by the receiver to these petitioners, and the remaining $10,000.00 yet to be paid to them under said agreement or contract, entirely, if not altogether, *was profit* realized by these petitioners out of their said contract with

the United States Government." This statement under oath is not denied by the answer of the appellant, but the evasive averment is made in the answer that "no profits were realized" from the work, followed by the statement that Dean and appellant sustained a loss of not less than $100,000 (11-12).

APPELLANT'S CONTENTIONS.

(*a.*)

Counsel for appellant contends that all of the contracts, except the original agreement of May 26, 1903, between Cowardin and associates and May & Jekyll, represent practically a single and simultaneous transaction, and that therefore the condition relating to the payment of the $8,000, made dependent on Cowardin and associates re .zing a profit, should be carried through the other contracts, so that unless Dean or the appellant realized a net profit from the contract, this $8,000 should not be payable to May & Jekyll. It is true that the contracts in question and the appointment of the receiver for Cowardin and associates were made on the 25th and 27th of August, 1903. The petition of Cowardin and associates (2) alleges that their contract with Dean was executed subsequently, but on the same day as their contract with May & Jekyll. The contract with May & Jekyll (39) provides, amongst other things, that Cowardin and associates "covenant and agree to assume and procure the assumption thereof by any third party or parties who may undertake to complete the contract of the parties hereto of the first part (Cowardin and associates) with the United States." It is nowhere in said contract alleged who these third parties may be, and Dean himself, the party with whom the contract was made on the same day, stated in his testimony, on page 37, that he had no connection whatever with May & Jekyll in this transaction. Cowardin and associates, in the contract of August 25, agreed fully to protect

May & Jekyll for the repayment of this $8,000, and this provision was incorporated in their future contracts.

It is claimed by appellant in its brief that roundabout procedure of appointing a receiver for Cowardin and associates, the contract with Dean, and the assumption of that contract by the appellant was essential at law to insure the assignment and repayment of the $65,000 and of the $8,000 out of the funds to be paid by the Government as the work progressed. However this may be, and it is immaterial, yet through these various contracts the appellant undertook to complete the work and assumed the obligations of Cowardin and associates to May & Jekyll and agreed that the receiver should pay the $65,000 and the $8,000 and partially acted thereon. By its contract of August 27 it again expressly recognized the obligation to pay May & Jekyll $8,000 by authorizing the receiver to deduct from the moneys paid to him by the Government proper amounts to insure carrying out of the condition contained in the original contract of August 25. The appellant thereby put it out of its power to claim that there is any other condition connected with the payment of the said $8,000 except that expressly contained in the contract of August 25, namely, that the receiver should pay this amount to May & Jekyll out of the 10 per cent retent held by the Government.

(*b.*)

Appellant in its brief lays much stress upon the apparent failure of May & Jekyll to demand their $8,000 until the completion of the work on the filtration plant and its final acceptance by the Government. As has been seen, this $8,000 was payable out of the 10 per cent of the contract price reserved by the Government until the work was finally accepted, unless sooner voluntarily paid to May & Jekyll by Cowardin and associates. So that if May & Jekyll had demanded of Cowardin and associates that the $8,000 be paid,

immediately after the latter had received from the appellant on account of the $65,000, a sum sufficient to pay the $8,000, on the theory that Cowardin and his associates, under the contract with the appellant, had then realized a profit, within the meaning of the contract of August 25, or had demanded of the appellant that it should pay that sum to them because it had assumed the obligations of that contract, the answer on the part of both Cowardin and his associates and of the appellant would assuredly have been that the money was not then due. Cowardin and associates would have said that not only was the money not due until the Government made the final payment of 10 per cent, but also that it could not be said that they had made a profit under the contract until the work had been finally accepted and paid for by the Government. Cowardin and associates always retained their position of contractors with the Government. It would have been said by them that the appellant might fail to carry out the provisions of the Government contract, in which event Cowardin and associates would be liable over to the Government on their bond to the Government, and the $65,000 received or to be received by Cowardin and associates would be utterly lost. To be sure, Cowardin and associates were protected by a bond given by the appellant, but the surety on this bond might prove insolvent. So that from the standpoint of Cowardin and associates it could not be said, on any theory, that the $8,000 was due May & Jekyll until the work was finally accepted and paid for by the Government, especially as May & Jekyll had agreed that that sum should not be paid until the last installment of the contract price, the 10 per cent retained, should be paid by the Government. The appellant, which had by its contract placed itself in the shoes of Cowardin and associates by assuming the latter's obligation to May & Jekyll, could have made a similar reply to any demand of May & Jekyll for the payment of the $8,000. To such a demand it would have been a perfect answer alone for the appellant to have called May & Jekyll's attention to their express agreement that the $8,000

was to be paid out of the 10 per cent retent; and that appellant would have made such a reply to any such demand is evident, as by delaying to pay the $8,000 until the work was completed and finally accepted by the Government it saved interest on that sum for several years.

(*c.*)

It is contended by appellant that as Cowardin and associates agreed to repay their indebtedness of $8,000 to May & Jekyll out of the net profits which might be realized by them from the performance of the Government work, or "under said contract with the United States" (the contract of August 25 puts it both ways), and as the $65,000 profit made by them was in fact realized not from such work, but from the sale to appellant of the plant which they had acquired from May & Jekyll, it follows that nothing is due May & Jekyll. But appellant, in making this contention, which is hardly more than a play upon words, loses sight of the vital fact that by the very instrument by which Dean acquired for it this plant, he promised, for appellant, to pay for the plant not only the $65,000, *but also to pay the $8,000* debt. That promise, founded upon a valuable consideration, binds the appellant, and it cannot escape from it. It was made with full knowledge of the nature of the debt, and that it was payable out of the 10 per cent retent of the contract price by the Government. It was made with full knowledge that Cowardin and associates could make no other profit out of the Government contract than the $65,000, for all profit in excess of that sum would have belonged to appellant. It was made with knowledge that that $65,000 was in fact profit to Cowardin and associates and nothing else. Having created that profit, how can appellant now deny it?

When the appellant assumed the performance of Cowardin and associates' contract with the Government, it took over from Cowardin and associates the plant, implements,

and contractors' equipment necessary to carry out the enterprise. The appellant by its agreement with Cowardin and associates knew that the latter had by prior contract with May & Jekyll been repaid all expenditures made by them on the enterprise, and agreed to pay Cowardin and associates $65,000.00, which they then knew was net profit of Cowardin and associates (all other expenses and debts of Cowardin and associates having been paid or assumed), and this amount would necessarily remain net profit to Cowardin and associates unless the appellant failed to perform the work for the Government. The work was carried out by appellant and the full contract price paid by the Government. No call was made by the Government on Cowardin and associates to expend any sum in the reduction of the $65,000.00 net profit to Cowardin and associates created by appellant, which net profit was subject only to be defeated by this contingency which never happened. The net profit to Cowardin and associates having thus been created by appellant, and the whole enterprise now being terminated without there having been any alteration or diminution in the sum of the said net profit, appellant is now precluded from denying what its contract expressly created, and from repudiating its express agreement that the receiver should pay May & Jekyll's claim out of the final payment received by him from the Government.

CHARLES COWLES TUCKER,
J. MILLER KENYON,
REGINALD S. HUIDEKOPER.
For Appellees, May & Jekyll.

SAND FILTRATION CORPORATION OF AMERICA *v.* COWARDIN.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 123. Argued April 6, 1909.—Decided April 26, 1909.

In the absence of a clear showing of its incorrectness this court accepts the finding of the lower courts.

The object of construction of a contract is to effectuate the intention of the parties in making it; and it should be interpreted in the light of the circumstances surrounding the parties at the time when it was made.

Although contracts relating to the same subject may be dated the same day they need not be construed together as one instrument if all the parties to both are not in privity.

An agreement to pay a sum out of profits of a contract *held*, in this case, not to depend on whether profits were or were not realized by a subcontractor but only on whether such profits were realized by the party making the contract.

29 App. D. C. 571, affirmed.

THE facts are stated in the opinion.

Mr. A. S. Worthington, with whom *Mr. Charles L. Frailey* was on the brief, for appellant.

Mr. Charles Cowles Tucker and *Mr. Reginald S. Huidekoper*, with whom *Mr. J. Miller Kenyon* was on the brief, for appellees May and Jekyll.

Mr. J. J. Darlington filed a brief in behalf of appellees Cowardin, Bradley, Clay and Stagg.

MR. JUSTICE DAY delivered the opinion of the court.

This case presents a question as to the proper construction of a certain contract. It arises as follows: Cowardin, Bradley, Clay

& Company, hereinafter called the Cowardin Company, had a contract with the Government of the United States for the construction of a filtration plant in the city of Washington. In the partial performance of the contract they had expended about $1,300 in money and had contracted debts somewhat in excess of $14,000. Afterwards, on May 26, 1903, the Cowardin Company sublet the contract to the appellees May and Jekyll. By this contract May and Jekyll agreed to reimburse the Cowardin Company for their expenditures; to pay the liabilities incurred by them, and to complete the work for 90 per cent of the contract price, permitting the Cowardin Company to have 10 per cent thereof as its profit. And further, May and Jekyll agreed to lend the Cowardin Company $10,000, and to furnish $50,000 for the purchase of a plant for doing the work. On August 25, 1903, May and Jekyll made a new contract with the Cowardin Company, surrendering their subcontract, executed a bill of sale to the Cowardin Company of the plant by which the work was being done, and as to the debts which May and Jekyll had contracted the Cowardin Company agreed to assume the same, and to procure the assumption thereof by any one who might undertake to complete the contract. The plant, including that purchased with the $50,000, was to be transferred to the Cowardin Company, and all the property to be conveyed in trust to certain trustees to secure the payment of the debts of May and Jekyll. As to the $10,000 advanced by May and Jekyll under the contract of May 26, 1903, of which $8,000 remained unpaid, the following stipulation was made:

"Inasmuch as the parties of the second part [May and Jekyll] have heretofore advanced to the parties of the first part [Cowardin Company] the sum of $10,000 under the eighth paragraph of said contract of May 26, 1903, and there now remains due to the said parties hereto of the second part $8,000 thereof, $2,000 having been paid thereon, the parties of the first part hereby covenant and agree to repay the parties of the second part, or to their order, the said sum of $8,000 out of the net profits which may be realized by the parties of the first part

from the construction or erection of that portion of said filtration plant which they have contracted with the United States to construct or erect. The said $8,000, if the same shall not be sooner voluntarily paid by the parties of the first part to the parties of the second part shall be reserved and paid out of the 10% of the contract price for said work which will be reserved by the United States; and if the parties of the first part shall not themselves continue said work under their contract with the United States, but shall procure some third party or parties to perform the same, or if the same shall be performed by any person or persons on behalf of the parties hereto of the first part appropriate provision shall be made for the reservation and payment of said $8,000 to the parties hereto of the second part; it being distinctly understood and hereby declared to be the purpose of this agreement that the repayment of the $8,000 shall be under the contingency that the parties of the first part shall realize a profit under said contract with the United States, and not otherwise; and that if any profit shall be so realized by them, it shall be subject to the payment of the said $8,000, or so much thereof as said profit will pay and satisfy."

On the same day, August 25, 1903, the Cowardin Company made a contract with one Dean, whereby, in consideration of the sale to Dean and Shibley, afterwards the Sand Filtration Corporation of America, appellant in this case, of the filtration plant and of the employment of appellant by a receiver to be appointed, to complete the work, Dean agreed to pay to the receiver $65,000 in instalments; to complete the work, and further "to comply with the provisions and conditions of one certain agreement entered into between the grantors (Cowardin Company) and May and Jekyll, a copy of which is hereto attached and to be read as a part thereof, including, among other provisions, the payment of the sum of $8,000 to the said May and Jekyll, as in the said agreement is provided, and the payment of which is also assumed by the said grantee (Dean)."

As under the law the Cowardin Company could not assign the contract with the Government, and as the company was in

financial difficulties, it was agreed that the receiver to be appointed for the Cowardin Company should enter into a contract with the Sand Filtration Corporation, successor of Dean, for the carrying out of the provisions of the contract of August 25, 1903, with the Cowardin Company. A receiver was appointed and a contract made, and on August 27th a further contract was entered into, whereby it was agreed that the receiver was to deduct from the money to be paid by the Government, as the work progressed, the sum of $65,000, and also the sum of $8,000 therein mentioned, and to pay the same directly to the Cowardin Company instead of paying it to Dean, and then receiving it back from him.

The Sand Filtration Corporation of America, successor to Dean, completed the work, and, as the record shows, at a loss of $100,000 or more. Pleadings were framed and issues made up, presenting to the court the question whether the receiver should be ordered to pay the sum of $8,000 to the Sand Filtration Corporation of America, appellant, or to May and Jekyll, under the contracts hereinbefore set forth. Upon hearing in the Supreme Court of the District of Columbia the court directed that this sum be paid by the receiver to May and Jekyll. From this decree the Sand Filtration Corporation of America appealed to the Court of Appeals of the District of Columbia, and that court affirmed the decree of the Supreme Court of the District. 29 App. D. C. 571. The case was then appealed here.

As we have said, the single question in this case is whether, under the facts recited, this $8,000 should go to the appellant as successor to Dean, or to May and Jekyll, as the courts below have held. It is insisted for appellant that the proper construction of the contract required payment of the $8,000 to May and Jekyll only upon the contingency that a profit should be realized under the construction contract with the United States, that is to say, if the construction of the filtration plant proved to be a profitable job then May and Jekyll were to be paid $8,000, or so much thereof as the profits would pay. The record discloses that appellant, successor of Dean, not only

made no profits, but on the contrary lost a large sum of money.

Upon the pleadings and testimony the lower courts have found, and we accept the finding in the absence of a clear showing of its incorrectness, that, without doing the work, the Cowardin Company has made out of the contract a sum in excess of $8,000 paid from the sums coming from the United States on account of the contract, in manner aforesaid.

The object of construction is to effectuate the intention of the parties in making a given contract. When the contract is in writing the language used should be interpreted in the light of the circumstances surrounding the parties at the time the contract was made. It is contended by the learned counsel for the appellant that the agreements of August 25, 1903, were cotemporaneous, and must be construed together as one agreement, and that the effect of such construction is to require the payment of $8,000 to May and Jekyll only in the event that the contract should prove profitable, and as no profit was realized from the construction nothing is to be paid. But while these contracts were dated the same day, whether they were executed at the same time or not does not appear, and certainly Dean was not in privity with May and Jekyll. The $8,000 was to be paid out of moneys reserved coming from the Government, and upon the contingency that a profit should be realized by the Cowardin Company. There was no agreement that the payment of this sum should be upon the contingency that any sub-contractor, such as Dean and his successor, should make a profit out of the contract. If such was the intention of the parties it is not so written in the contract. May and Jekyll were to have the money advanced by them repaid if "the party of the first part," the Cowardin Company, "shall realize a profit, under said contract." It is clear that the Cowardin Company did make a profit, and we are unable to see that it makes any difference that it was realized in the manner we have detailed, rather than from the construction of the work. The substance of the agreement between the Cowardin Company and May

and Jekyll looked to the repayment of the money advanced in case the Cowardin Company realized a profit. This it has done, and we think the conditions of the contract have been kept.

It is suggested by the learned counsel for the plaintiff in error that as the profit of $65,000 was realized by the Cowardin Company by the agreements of August 25, 1903, and as they were cotemporaneous, the agreement for payment of the $8,000 only in the contingency of profit cannot mean the $65,000 so realized by the execution of the papers, but had reference to future profits in doing the work.

But it is to be noted that the Cowardin Company was the only party contracting with the United States, and had Dean thrown up the contract or failed to complete the construction of the work the Cowardin Company would still have been held on their contract and bond. Until Dean or his successor completed the work the Cowardin Company was not absolved from liability so far as the Government was concerned, and it could not be known whether a profit would be made or not.

As the Cowardin Company did realize such profit as required the payment of the $8,000 to May and Jekyll by the receiver out of the sums received from the Government, the courts below were right in so ordering.

The judgment of the Court of Appeals of the District of Columbia is affirmed.

Affirmed.

Dissenting: MR. JUSTICE MCKENNA and MR. JUSTICE MOODY.